373 N.C.—No. 3 Pages 182-259

ADVISORY COMMISSION ON PORTRAITS;
ORDER CONCERNING CITATION FORM

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

MARCH 5, 2020

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

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OF
NORTH CAROLINA

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 6 DECEMBER 2019

ORDERS

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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Competency of parent—intellectual disability—In a termination of parental rights case, the trial court did not abuse its discretion by not conducting an inquiry into a mother's competency where the mother had a mild intellectual disability but had been able to work and attend school. **In re Z.V.A., 207.**

Grounds for termination—failure to make reasonable progress—findings of fact—Where the trial court terminated a mother's parental rights to her three children for failure to make reasonable progress toward correcting the conditions that led to the removal of her children, the findings challenged by the mother on appeal were supported by competent evidence. As the trier of fact, the trial court properly passed upon the credibility of witnesses and the weight of their testimony and drew reasonable inferences from the evidence. **In re A.R.A., 190.**

Grounds for termination—failure to make reasonable progress—sufficiency of findings—In a termination of parental rights case, the trial court's findings supported its conclusion that a mother failed to make reasonable progress under the circumstances toward correcting the conditions that led to the removal of her children, pursuant to N.C.G.S. § 7B-1111(a)(2). Although the mother argued that she complied with court-ordered services and therefore made reasonable progress, her argument failed to acknowledge that the primary reason for the removal of her children was the presence of the father—who had assaulted several of the children and the mother—in the home. The mother had voluntarily placed the children in foster care so that she could live with the father, and he remained in the home throughout the termination hearing. **In re A.R.A., 190.**

Grounds for termination—neglect—likelihood of future neglect—The trial court's conclusion that a father's parental rights were subject to termination based on neglect was supported by the evidence where the father was willing to leave the child alone with her mother even though the mother was unfit for such responsibility, the parents exhibited marital discord during supervised visits with their child, and the parents intended to remain together. **In re Z.V.A., 207.**

Judicial bias—permanent plan—adoption—child's best interest—The Supreme Court rejected an argument that the trial court was unfairly biased against parents in a termination of parental rights case where the trial court made a statement regarding its previous decision to send the child to live with her out-of-state aunt. At the time of that decision, the district court had already changed the primary permanent plan to adoption, and the statement in question was merely an explanation that the court had decided those steps were in the child's best interest at the time—rather than a definitive decision to terminate the parents' rights months before the termination hearing. **In re Z.V.A., 207.**

Neglect and willful abandonment—case plan compliance—limited progress —The trial court's order terminating a mother's parental rights to her children on the basis of neglect and willful abandonment was affirmed where the court's findings that the mother did not maintain stable employment or housing for at least six months and that she did not complete the recommended treatment for substance abuse and domestic violence were supported by competent evidence, and where the mother admitted to not feeling comfortable being reunified with her children until a much later date for fear of suffering a relapse. The findings of fact supported the trial court's conclusion that the mother had not made reasonable progress on her case plan, which in turn supported the grounds for termination of parental rights. **In re I.G.C., 201.**

No-merit brief—neglect and willful abandonment—The trial court's termination of a father's parental rights to his children for neglect and willful abandonment was affirmed where the father's counsel filed a no-merit brief. The trial court's order was supported by competent evidence and based on proper legal grounds. **In re I.G.C., 201.**

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

January 6, 7, 8
February 3, 4
March 9, 10, 11, 12
April 6, 7, 20
May 4, 5, 6, 7
August 31
September 1, 2, 3
October 12, 13, 14, 15

ALBERT S. DAUGHTRIDGE, JR. AND
MARY MARGRET HOLLOMAN DAUGHTRIDGE
v.
TANAGER LAND, LLC

No. 325PA18

Filed 6 December 2019

Boundaries—demarcation—ambiguity—intent of parties—factual question for jury

Where conveyances of adjoining lots referenced only lot numbers and a recorded map and not metes and bounds descriptions, the map's ambiguity regarding where the boundary existed between the lots presented a question of fact about the grantor's intention that must be decided by a jury.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a divided, unpublished decision of the Court of Appeals, No. COA17-554, 2018 WL 3977990 (N.C. Ct. App. August 21, 2018), that affirmed an order granting summary judgment entered on 30 November 2016 by Judge Beecher R. Gray and a final judgment and assessment of costs entered on 8 February 2017 by Judge Marvin K. Blount, III, both in Superior Court, Halifax County. Heard in the Supreme Court on 13 May 2019 in session in the Halifax County Courthouse in the Town of Halifax pursuant to section 18B.8 of Chapter 57 of the 2017 Session Laws of the State of North Carolina.

Boxley, Bolton, Garber & Haywood, L.L.P., by Ronald H. Garber, for plaintiff-appellants.

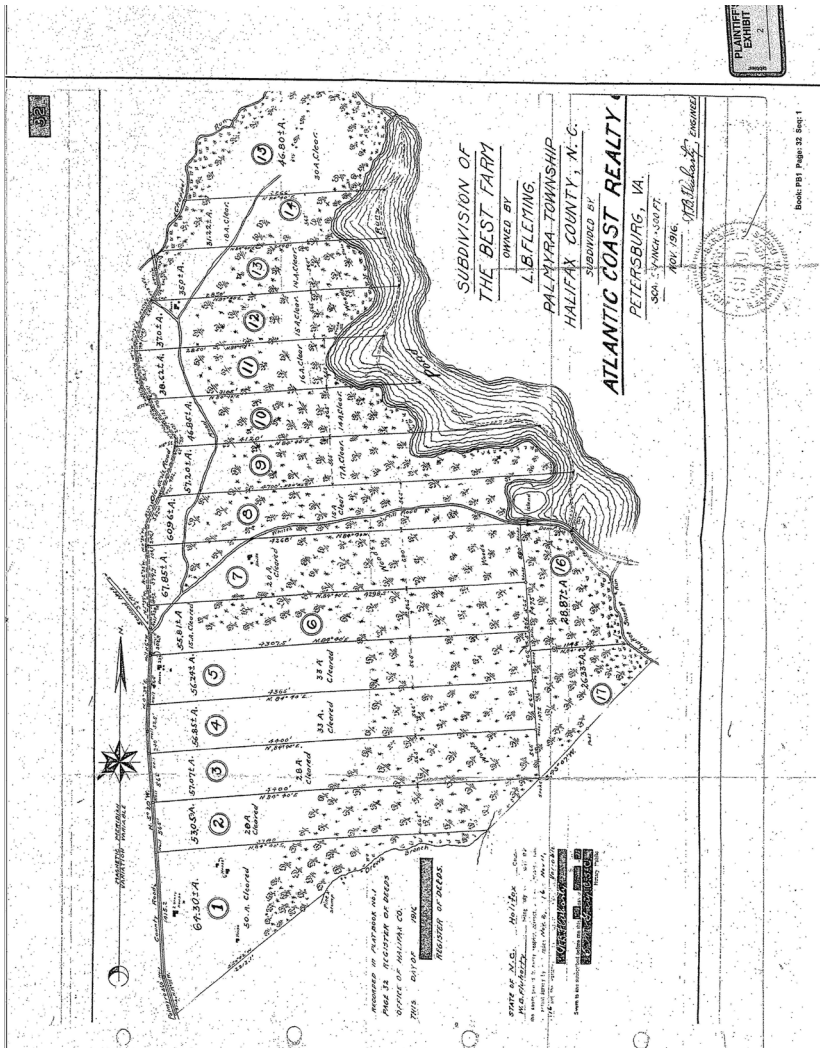
Charles S. Rountree, III for defendant-appellee.

NEWBY, Justice.

This land dispute presents the question of whether a court should decide the intent of the parties as a matter of law when the conveyances only reference lot numbers on a recorded map and where the disputed property line as shown on the map is ambiguous. Under these circumstances, the intent of the parties concerning the boundary line is a question of fact to be determined by a jury. Because we hold there is a genuine issue of material fact as to the intended boundary, we

reverse the decision of the Court of Appeals that affirmed summary judgment and other relief granted by the trial court.[1]

After acquiring a large tract of land in 1916, L.B. Fleming subdivided it into seventeen numbered lots and filed a map, the Best Farm Map ("the map"), in Plat Book 1, Page 32 in the Halifax County Registry, shown in full below.



1. The trial court granted, and the Court of Appeals affirmed, defendant's motion to dismiss plaintiffs' claim and defendant's motion for summary judgment to quiet its title.

Eight of the lots have as their eastern boundaries a hypothetical line in White's Mill Pond Run (the mill pond). Only the southern boundary of Lot 8, however, does not have a metes and bounds description to the hypothetical eastern line terminating in the mill pond. Shortly after recording the map, Fleming deeded plaintiffs' predecessor in title Lots 7 and 16 and defendant's predecessor in title Lot 8. The conveyances described the land using lot numbers as being the lots as shown on the recorded map; the respective deeds do not include metes and bounds descriptions. The map shows the dividing boundary between Lot 16 and Lot 8 to be along or near the high water line of an inlet of the mill pond. The map shows the mill pond without metes and bounds. Plaintiff alleges the high water line has always been recognized as the boundary, allowing plaintiffs to have water access and a boat ramp.

There was no dispute as to the property line until 2008 when, before acquiring Lot 8, defendant requested a survey. That survey purports to place a sliver of land along the southern shore of the pond inlet within Lot 8. The contested property is land lying between the high water line and the center of an earthen dam, extending along a portion of the shoreline ("the contested property"). Again, only by reference to a recorded map, this time the 2008 map, defendant took ownership of Lot 8,[2] claiming the contested property. After the purchase was completed, defendant installed a gate and posts on land that plaintiffs believed to be their land, eliminating plaintiffs' access to the mill pond.

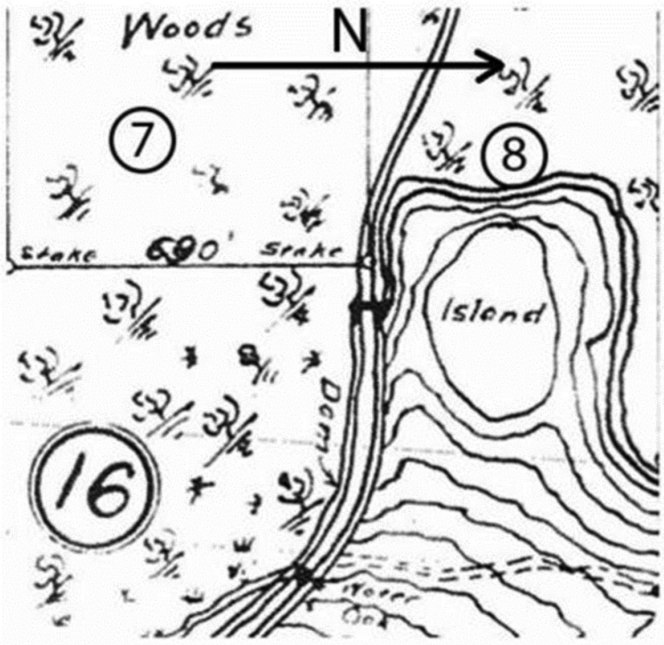
On 17 November 2015, plaintiffs filed their complaint in Superior Court, Halifax County, seeking a declaratory judgment and to quiet title, and filed a notice of *lis pendens* with the Register of Deeds on that same day. Plaintiffs filed an amended complaint on 26 February 2016. Plaintiffs' amended complaint described the portion of land at issue and defendant's alleged encroachments upon plaintiffs' land. Plaintiffs sought a declaratory judgment that the disputed land lies within the boundary of Lot 16, that the title be quieted, and that defendant's encroachments be removed. Defendants answered claiming the disputed land to be within its boundary.

The trial court declared defendant the lawful owner of the property in question, dismissed plaintiffs' notice of *lis pendens*, declared void plaintiffs' map recorded in Map Book 2016, page 96 (the Stahl survey), and awarded costs to defendant. The analysis herein that identifies a genuine issue of material fact and reverses summary judgment is equally applicable to the dismissal of plaintiffs' claim and other relief granted; thus, our holding reinstates the entire original suit. The orders of the trial court filed 30 November 2016 and 8 February 2017 are reversed.

2. A 1.19 acre tract was excluded from the conveyance of Lot 8.

On 5 October 2016, defendant moved to dismiss plaintiffs' action to quiet title and enter summary judgment for defendant, to strike the notice of *lis pendens*, and to award defendant costs and attorney fees. Plaintiffs responded to defendant's motion and attached surveys, affidavits, land leases, and depositions. Plaintiffs included an affidavit from surveyor Michael Stahl and an accompanying property line survey dated 20 July 2015. Plaintiffs' evidence tended to show that plaintiffs' boundary line extended to where the land north of the dam touches the high water line of the mill pond on the 1916 map (relevant portion of the map enlarged and shown below).

Plaintiffs point to the location of the high water line as demarcated



by "Water Oak ●" on the map, a description of the boundary line that provides Lot 16 with water access. Plaintiffs assert that the "●" as used throughout the recorded map marks a location in the water while an "○"shows locations on dry land. Plaintiffs' family has used the disputed portion of the land to fish, boat, and swim for one hundred years and installed a boat ramp for their use in the 1940s. Plaintiffs claim the contested property was first and only attributed to defendant's Lot 8 in the survey done for defendant in 2008. Similarly, defendant supported

its interpretation of the boundary line with affidavits, surveys, and other evidence.

The trial court dismissed plaintiffs' claim and granted summary judgment and other relief for defendant. It concluded "[t]he boundary between the parties' parcels of land in contention . . . is the Dam as depicted on the [1916] map . . . ." The trial court voided a map recorded by plaintiffs, the Stahl survey, because it refuted the placement of the boundary along the dam. Plaintiffs appealed.

On appeal the Court of Appeals observed that, following defendant's purchase of Lot 8, "defendant and plaintiffs both claimed title and ownership" of the contested property. *Daughtridge v. Tanager Land, LLC*, No. COA17-554, slip. op. at 2, 2018 WL 3977990 at *1 (N.C. Ct. App. August 21, 2018) (unpublished). The Court of Appeals admitted "the [1916] map is unclear as to what the boundary is and where the boundary line between their respective lots is located." *Id.* Central to the Court of Appeals' resolution of the dispute was the dam shown on the 1916 map. The Court of Appeals acknowledged the dam does not extend the full distance of the boundary. *Id.* at 4 n.1, 2018 WL 3977990 at *5 n.1 ("This result, which the trial court adopted, carries the centerline of the dam past the point where the dam ends and over a portion of land that is not subject to the same potential rules of construction."). Nevertheless, the Court of Appeals treated the dam, a monument shown on a map, the same way as a monument identified in a deed's legal description. It concluded: "Therefore, because the high water line is unlabeled and the water oak cannot be identified, we hold the dam is a monument that marks the boundary between the lots. This is consistent with the principle that the more permanent monuments control the interpretation of boundaries on plats." *Id.* at 11, 2018 WL 3977990 at *5. Thus, it upheld the trial court's grant of summary judgment for defendant and other relief. *Id.* at 12, 2018 WL 3977990 at *5.

"This Court reviews appeals from summary judgment de novo." *Ussery v. Branch Banking & Tr.*, 368 N.C. 325, 334–35, 777 S.E.2d 272, 278 (2015) (citation omitted). Summary judgment is proper if "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2017). "The movant is entitled to summary judgment . . . when only a question of law arises based on undisputed facts." *Ussery*, 368 N.C. at 334, 777 S.E.2d at 278 (citation omitted). "All facts asserted by the [nonmoving] party are taken as true and . . . viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted). "A genuine issue of material fact 'is one that

can be maintained by substantial evidence.' " *Ussery*, 368 N.C. at 335, 777 S.E.2d at 278 (quoting *Dobson*, 352 N.C. at 83, 530 S.E.2d at 835). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' and means 'more than a scintilla or a permissible inference.' " *Id.* at 335, 777 S.E.2d at 278–79 (quoting *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977)).

Under section 41-10 of our General Statutes, an individual can initiate an action to remove a cloud on title "against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims . . . ." N.C.G.S. § 41-10 (2017).

> The statutory action to quiet title to realty consists of two essential elements. The first is that the plaintiff must own the land in controversy, or have some estate or interest in it; and the second is that the defendant must assert some claim to such land adverse to the plaintiff's title, estate or interest.

Wells v. Clayton, 236 N.C. 102, 107, 72 S.E.2d 16, 20 (1952) (citations omitted). Plaintiff bears the burden of establishing better title. *See Day v. Godwin*, 258 N.C. 465, 469, 128 S.E.2d 814, 816–17 (1963); *Mobley v. Griffin*, 104 N.C. 112, 114, 10 S.E. 142, 142–43 (1889). "Where title to land is in dispute, claimant must show that the area claimed lies within the area described in each conveyance in his chain of title and he must fit the description contained in his deed to the land claimed." *Cutts v. Casey*, 271 N.C. 165, 167, 155 S.E.2d 519, 521 (1967)); *see also Jones v. Percy*, 237 N.C. 239, 242, 74 S.E.2d 700, 702 (1953).

Interpreting a deed is a matter of law for the court. *See Brown v. Hodges*, 232 N.C. 537, 541, 61 S.E.2d 603, 606 (1950). The intent of the parties controls. *See Cox v. McGowan*, 116 N.C. 131, 133, 21 S.E. 108, 109 (1895) (When interpreting a deed, courts discern what the parties intended to convey by placing themselves in the position of the parties at the time of the conveyance.). "*What* are the boundaries is a matter of law to be determined by the court from the description set out in the conveyance. *Where* those boundaries may be located on the ground is a factual question to be resolved by the jury." *Batson v. Bell*, 249 N.C. 718, 719, 107 S.E.2d 562, 563 (1959) (emphasis added).

Here it is undisputed that the grantor intended to grant all of Lot 16 to plaintiffs' predecessor and all of Lot 8 to defendant's predecessor. Thus the meaning of the language of the deeds is not in dispute. What is unclear from the face of the conveyances is what land each

conveyance includes. Neither conveyance includes a metes and bounds description for the court to interpret as a matter of law. The chains of title of both plaintiffs and defendant simply use lot numbers and reference a recorded map. If the map were unambiguous then the court could determine the intent of the parties; however, here with reference only to a map, and that map being ambiguous, what the grantor intended the dividing boundary to be between Lots 16 and 8 remains unclear. Under these circumstances, the intent of the parties is a question of fact to be determined by a jury.

The map uses metes and bounds with defined corners for all the landlocked conveyances depicted. For those lots abutting water, it merely indicates the existence of the waterway and the water's approximate location. The map is unclear along the northern boundary of Lot 16. The map precisely locates the common corner of Lots 7, 16, and 8 as an iron pin ("common corner") on the northern edge, not in the centerline, of an old road, White Mill Road. While the map shows the dam, the dam does not extend all the way to this common corner. Thus, defendant's view that the dam is the boundary does not answer the question of what the boundary line is between the common corner and the beginning of the dam. Interpreting the map in the light most favorable to plaintiffs as required by the summary judgment standard, the grantor could well have intended to make the northern boundary of Lot 16 the high water line, giving water access to Lot 16.

Likewise, the southeastern corner of Lot 8 is unclear. Significantly, all of the lots with a terminus point in the pond have a metes and bounds description from a known point to a point in the pond, except the southern line of Lot 8. The line's metes and bounds description ends at the common corner of Lots 7, 16, and 8. The map itself does not prove the southern boundary of Lot 8 extends eastward beyond the common corner. According to plaintiffs, the boundary of their Lot 16 is the high water line, as illustrated by "Water Oak ●" on the map, marking the northeast corner of Lot 16, where the land meets the water of the mill pond inlet. The map shows defendant's eastern boundary to be in the mill pond, but the southeastern corner is unmarked. It certainly begs the question of why would a grantor remove water access to Lot 16 and give a thin sliver of land along the shoreline to Lot 8.

Since the intent of the parties as shown on the map is ambiguous, a jury issue exists. In interpreting all the forecasted evidence in the light most favorable to the nonmoving party, plaintiffs have established a prima facie case and presented sufficient evidence to withstand a summary judgment motion. As noted by the trial court and the Court of

Appeals, defendants have likewise provided sufficient evidence to create a genuine issue of material fact. At trial the parties can present all relevant evidence to establish the intent of the parties regarding ownership of the contested property pursuant to the 1916 map. Because a genuine issue of material fact exists, the decision of the Court of Appeals affirming the trial court's dismissal of plaintiffs' claim and granting summary judgment and other relief to defendant is reversed. This matter is remanded to the Court of Appeals for further remand to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HAMLET H.M.A., LLC D/B/A SANDHILLS REGIONAL MEDICAL CENTER
v.
PEDRO HERNANDEZ, M.D.

No. 425A18

Filed 6 December 2019

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 821 S.E.2d 600 (2018), affirming in part the judgment entered on 9 January 2017 by Judge Richard T. Brown in Superior Court, Richmond County, and reversing and remanding the granting of a directed verdict as to defendant's unfair and deceptive trade practices counterclaim. Heard in the Supreme Court on 30 September 2019 in session in the J. Newton Cohen, Sr. Rowan County Administration Building in the City of Salisbury pursuant to section 18B.8 of Session Law 2017-57.

Freeman & Freeman, LLC, by William S. F. Freeman, for plaintiff.

Law Office of Mark L. Hayes, by Mark L. Hayes, for defendant.

Linwood Jones, for N.C. Healthcare Association, amicus curiae.

Josh Stein, Attorney General, by Ryan Y. Park, Deputy Solicitor General; K. D. Sturgis and Daniel Paul Mosteller, Special Deputy Attorneys General; and Laura H. McHenry, Assistant Attorney General; for State of North Carolina, amicus curiae.

Winslow Wetsch, PLLC, by Laura J. Wetsch; and Higgins Benjamin, by Jonathan Wall; for NC Advocates for Justice, amicus curiae.

PER CURIAM.

Justice DAVIS did not participate in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Piro v. McKeever*, 369 N.C. 291, 291, 794 S.E.2d 501, 501 (2016) (per curiam) (affirming a Court of Appeals opinion without precedential value by an equally divided vote).

AFFIRMED.

IN THE MATTER OF A.R.A., P.Z.A., Z.K.A.

No. 65A19

Filed 6 December 2019

1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—findings of fact

Where the trial court terminated a mother's parental rights to her three children for failure to make reasonable progress toward correcting the conditions that led to the removal of her children, the findings challenged by the mother on appeal were supported by competent evidence. As the trier of fact, the trial court properly passed upon the credibility of witnesses and the weight of their testimony and drew reasonable inferences from the evidence.

2. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—sufficiency of findings

In a termination of parental rights case, the trial court's findings supported its conclusion that a mother failed to make reasonable progress under the circumstances toward correcting the conditions that led to the removal of her children, pursuant to N.C.G.S. § 7B-1111(a)(2). Although the mother argued that she complied with court-ordered services and therefore made reasonable progress, her argument failed to acknowledge that the primary reason for the removal of her children was the presence of the father—who had assaulted several of the children and the mother—in the home. The

mother had voluntarily placed the children in foster care so that she could live with the father, and he remained in the home throughout the termination hearing.

3. Termination of Parental Rights—best interest of the child—statutory factors

The trial court did not abuse its discretion by concluding that it would be in a child's best interest for his mother's parental rights to be terminated. Even assuming that the findings of fact challenged by the mother were erroneous, any such error would not support a conclusion that the trial court abused its discretion where the court properly considered the appropriate factors in N.C.G.S. § 7B-1110(a) and found that the child was almost nine years old and termination of his mother's parental rights would aid in achieving the permanent plan of adoption.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to determination in the Court of Appeals, of an order entered on 12 December 2018 by Judge Ali B. Paksoy in District Court, Cleveland County. This matter was calendared for argument in the Supreme Court on 7 November 2019 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Charles E. Wilson, Jr. for petitioner-appellee Cleveland County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by William L. Esser IV, for appellee Guardian ad Litem.

Surratt Thompson & Ceberio PLLC, by Christopher M. Watford, for respondent-appellant mother.

MORGAN, Justice.

Respondent-mother appeals from the district court's 12 December 2018 order terminating her parental rights to A.R.A. (Amy), P.Z.A. (Peter), and Z.K.A. (Zara) (collectively, the children).[1] We affirm.

1. Pseudonyms have been used to protect the identity of the juveniles and for ease of reading.

The Cleveland County Department of Social Services (DSS) has an extensive history of involvement with respondent-mother and the father[2] of the juveniles in this matter, based upon the father's substance abuse and domestic violence issues. In 2013, the father was convicted of assaulting Amy and respondent-mother. In 2015, the father assaulted Peter and threatened to kill Peter and respondent-mother. The father assaulted Amy again in 2015, resulting in a conviction of habitual misdemeanor assault. After serving time in prison for the habitual misdemeanor assault conviction, the father was released from incarceration in October 2016. In December 2016, respondent-mother allowed the father to return to the home where she lived with the children, despite his prior assaults on them and in violation of a specific condition of the father's post-release supervision conditions.

On 20 December 2016, respondent-mother voluntarily placed all three children in foster care so that the father could reside in the family home with her. On 13 January 2017, DSS obtained nonsecure custody of the children and filed a juvenile petition alleging that the children were neglected juveniles. In its petition, DSS alleged that respondent-mother and the father had repeatedly failed to comply and cooperate with DSS and the court to assist the parents in keeping the children safe and in avoiding the need for an out-of-home placement.

The district court entered a combined adjudication and disposition order on 24 March 2017. Based upon stipulations made by the parties, the children were adjudicated to be neglected juveniles, and custody of the juveniles was continued with DSS. Respondent-mother was ordered to complete a court-approved parenting education program; demonstrate appropriate parenting skills and an understanding of how substance abuse and domestic violence affects the children; complete an assessment by the Abuse Prevention Council (APC) or another court-approved domestic violence victims' program and comply with all recommendations for treatment; and demonstrate her ability to provide a safe and stable home environment consistent with county minimum standards and that is free from substance abuse and domestic violence for a minimum of six months. The father was ordered to comply with similar requirements, with the additional requirements

2. The father filed timely notice of appeal to this Court from the termination order, but subsequently filed a motion to withdraw his appeal on 10 June 2019. This Court allowed the father's motion to withdraw his appeal by order entered 1 July 2019. Although the father therefore is not a party to this appeal, his actions and presence in respondent-mother's case are highly relevant. Accordingly, we discuss the father's involvement with the matter in significant detail.

of completing a substance abuse assessment; obtaining assessment through a domestic violence batterer's program; and complying with all resulting recommendations.

At a review hearing held on 14 June 2017, pursuant to N.C.G.S. § 7B-906.1, the district court found that respondent-mother and the father had continued to reside together. Respondent-mother had started parenting classes and the APC program, but had missed two sessions of the APC program.

On 1 November 2017, the district court held a permanency planning hearing pursuant to N.C.G.S. § 7B-906.1, at which respondent-mother stated that it was Amy who had wanted the father to return to the family home upon his release from prison. In an order entered on 14 November 2017, the district court found that respondent-mother and the father continued to reside together, and that they continued to deny or minimize the impact that their substance abuse and history of domestic violence had upon the children. Respondent-mother completed a parenting program in July 2017, but, at the time of the hearing, had completed only four out of the twelve sessions required by the APC program. The district court further found that respondent-mother and the father both tested positive for marijuana in September 2017. The district court adopted a primary permanent plan of reunification with a secondary permanent plan of custody with a court-approved caretaker.

On 20 December 2017, the district court held a permanency planning review hearing. The district court entered an order on 11 January 2018 finding that, although respondent-mother and the father had made some effort to comply with the court's requirements, they had not demonstrated to the court any significant progress in correcting the conditions that led to the children's removal from their care. Respondent-mother was scheduled to complete the APC program on 22 December 2017 but had failed to comply with the court's recommendations for mental health services and substance abuse treatment. Both parents continued to deny responsibility for their situation and placed the blame on the children, particularly Amy. In its January 2018 order, the district court changed the primary permanent plan to adoption, concurrent with a secondary permanent plan of reunification.

On 22 January 2018, DSS filed a petition to terminate the parental rights of respondent-mother and the father on the grounds of neglect, willful failure to make reasonable progress, and willful failure to pay a reasonable portion of the cost of care. *See* N.C.G.S. § 7B-1111(a)(1)–(3) (2017). The district court held hearings on the 2018 dates of 18 July,

25 September, and 16 November, and on 12 December 2018, entered an order finding that the evidence in the case established facts sufficient to support the termination of respondent-mother's and father's parental rights on the grounds of neglect and willful failure to make reasonable progress. The district court further concluded that it was in the children's best interests that both parents' parental rights be terminated. Accordingly, the district court terminated the parental rights of respondent-mother and the father.

Respondent-mother gave timely notice of appeal to the North Carolina Court of Appeals. On 8 April 2019, respondent-mother filed a petition with this Court seeking discretionary review of the order terminating her parental rights, prior to a determination of the Court of Appeals. This Court allowed respondent-mother's petition for discretionary review on 1 May 2019.

The North Carolina Juvenile Code provides for a two-stage process for the termination of parental rights: adjudication and disposition. N.C.G.S. §§ 7B-1109, -1110 (2017). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1109(f). We review a district court's adjudication under N.C.G.S. § 7B-1109 "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). "If [the district court] determines that one or more grounds listed in section 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110).

Respondent-mother challenges both grounds for termination as found by the district court. Because a finding of only one ground is necessary to support a termination of parental rights, we only address respondent-mother's argument regarding the basis for termination of her willful failure to make reasonable progress. *See In re T.N.H.*, 831 S.E.2d 54, 62 (N.C. 2019). A district court may terminate a parent's parental rights pursuant to Section 7B-1111(a)(2) if the parent "has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in

correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2).

The findings in the adjudication order indicate that the father's issues with substance abuse, the commission of domestic violence in the presence of the children, and respondent-mother's failure to protect the children by allowing the father to reside in the home were the underlying reasons for the children's removal. The district court observed that upon intervention by DSS, respondent-mother elected to voluntarily place the children in foster care "so that the . . . father could reside in the home with her." In its termination order, the district court found that respondent-mother had continued to live with the father since December 2016. Instead of protecting the children, respondent-mother continued to blame the children, as well as other people such as the father's probation officer, for the father's return to the home. She continued to defend the father throughout the termination hearing. The district court further found that because respondent-mother displayed "a lack of understanding or acceptance of responsibility for the circumstances and conditions that led to the [children's] removal," she had failed to demonstrate to the satisfaction of the district court that she had made reasonable progress under the circumstances in correcting those conditions.

[1] On appeal, respondent-mother initially challenges several of the district court's findings of fact. Those findings of fact which she does not challenge are deemed to be supported by competent evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citing *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962); *Williams v. Williams*, 97 N.C. App. 118, 121, 387 S.E.2d 217, 219 (1990)). Moreover, we limit our review of challenged findings to those that are necessary to support the district court's determination that this ground of respondent-mother's willful failure to make reasonable progress existed in order to terminate her parental rights. *In re T.N.H.*, 831 S.E.2d at 58–59 (citing *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133).

Respondent-mother challenges finding of fact 47, which states:

> That the . . . parents did not give the Social Worker their address until August 21, 2018. However, the parents have continued, th[r]ough this termination hearing, to refuse the Social Worker access to their home . . . . The [parents] have therefore not established safe and stable housing.

Specifically, respondent-mother argues that her testimony directly contradicts the court's finding that the parents refused access to the home

and contends that the district court impermissibly shifted the burden of proof onto respondent-mother to prove at the termination hearing the existence of safe and stable housing. We disagree.

Other, unchallenged findings of fact indicate that respondent-mother and the father had been evicted from their residence in January 2018 and had either refused or failed to provide a new address to the DSS social worker between January and June 2018, making it difficult for the social worker to conduct the home visits necessary to assess respondent-mother's ability to provide safe and stable housing. At the termination hearing, a DSS social worker testified that respondent-mother and the father had provided a new home address to her on 21 August 2018. However, the social worker was refused access to the home and, therefore, was unable to determine whether or not it was appropriate for the children. The social worker further testified that she made four attempts to visit the home and in all four instances, the parents canceled the visits. Although respondent-mother testified that she "was not aware of the first time that [the social worker] was gonna visit" and that she was called in to work on the other days that she was scheduled to meet with the social worker, it is well-established that a district court "ha[s] the responsibility to 'pass[ ] upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom.' " *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68 (quoting *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968)).

Thus, it was reasonable for the district court to infer that by repeatedly canceling home visits, respondent-mother and the father were preventing the social worker from having access to their home. Moreover, the district court did not improperly shift DSS' burden of proof onto respondent-mother. Rather, the court simply observed that respondent-mother had failed to rebut DSS' clear, cogent, and convincing evidence that she and the father had not established safe and stable housing for the children. *See*, *e.g.*, *In re Clark*, 72 N.C. App. 118, 125, 323 S.E.2d 754, 758 (1984) (holding that instead of shifting the burden of proof, the challenged finding was "nothing more than an accurate statement of the procedural stance of the case. The finding recites only that the respondents did not produce evidence that contradicted the allegations set forth in the petition.").

Next, respondent-mother challenges the portion of finding of fact 49 that provides that the parents "have failed to complete their case plan." Respondent-mother claims that she has completed the only case plan referenced in the underlying record.

Unchallenged findings of fact establish that respondent-mother was required to complete a parenting education program and demonstrate appropriate parenting skills, to complete an assessment through APC and comply with recommendations for treatment, and to provide a safe and stable home which was free from substance abuse and domestic violence. While the evidence shows that respondent-mother made some progress in her case plan by completing the APC program and a parenting education program, nonetheless clear, cogent, and convincing evidence also demonstrates that she failed to establish an ability to provide a safe and stable home environment for the children. Thus, these findings are supported by the evidence and establish that respondent-mother failed to complete her case plan.

Lastly, respondent-mother challenges the portion of finding of fact 51 that provides that she "has demonstrated that her relationship with the . . . father takes priority over the safety of her children." She argues that the district court erred by finding that she prioritized her relationship with the father over the safety of the children, where there was no evidence that the parents had engaged in domestic violence or that the father had engaged in abusive behavior during visits.

The unchallenged findings of fact reveal that respondent-mother voluntarily placed the children in DSS custody so that the father could live with her, that she consistently blamed others for the father's return to the home, and that she continued to defend the father throughout the termination hearing. Additional unchallenged findings of fact demonstrate that the father denied responsibility for assaulting the children and that he failed to acknowledge responsibility for the children's removal from the home. Although the father failed to comply with his case plan, respondent-mother continued to live with the father from the time that the children were removed from the home until the termination hearing. As the trier of fact, the district court reasonably inferred that even where there was no evidence of domestic violence occurring between the parents after the children's removal, respondent-mother's actions nevertheless indicated that she placed the importance of her relationship with the father over the safety of her children.

[2] Secondly, respondent-mother contends that the district court erred by concluding that a ground existed to terminate her parental rights under N.C.G.S. § 7B-1111(a)(2) where she complied with court-ordered services. Respondent-mother submits that she made "reasonable progress under the circumstances to correct those conditions concerning inappropriate parenting choices and exposure of the children to past domestic violence which were the grav[a]men of the concerns originally raised in December 2016." We are not persuaded by this assertion.

Respondent-mother's argument disregards the primary reason for the removal of her children—the presence of the father in the home. The district court's findings of fact demonstrate that respondent-mother failed to protect her children by allowing the father, who had assaulted Amy, Peter, and respondent-mother, to return to the family home. Instead, respondent-mother voluntarily placed the children into DSS custody so that she could live with the father. She continued to live with him through the time of the termination hearing. The district court further found that, at the time of the termination hearing, respondent-mother continued to deny the effect the father's domestic abuse had on the children and to blame others, including the children, for the father's return to the home. Throughout the termination hearing, respondent-mother displayed a lack of understanding or acceptance of responsibility for the conditions that led to the children's removal. Based on the foregoing, we conclude that the district court's findings support its conclusion that respondent-mother failed to make reasonable progress under the circumstances toward correcting the conditions that led to the removal of the children.

[3] Finally, respondent-mother argues that the district court abused its discretion by concluding that it would be in Peter's best interest that respondent-mother's parental rights be terminated. She asserts that several of the district court's dispositional findings of fact are not supported by the evidence and that the district court failed to make sufficient findings regarding the factors set forth in N.C.G.S. § 7B-1110(a).

Once the district court finds at least one ground to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a), it proceeds to the dispositional stage where it must "determine whether terminating the parent's rights is in the juvenile's best interest" based on the following factors:

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

(3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C.G.S. § 7B-1110(a). The district court's assessment of a juvenile's best interest at the dispositional stage is reviewed only for abuse of discretion. *In re D.L.W.*, 368 N.C. at 842, 788 S.E.2d at 167 (citations omitted). " '[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

First, respondent-mother disputes some of the findings of fact contained in the dispositional portion of the district court's order. She contends that a portion of finding of fact 69, stating that the parents had been advised of Peter's appointments with his most recent therapist, was not supported by the evidence. Respondent-mother also posits that portions of findings of fact 70, 71, and 74 are not proper findings of fact because they are not determinations made from logical reasoning or because they lack evidentiary support. However, assuming *arguendo* that the challenged findings are erroneous, any such error would not support the conclusion that the district court abused its discretion in light of the evidence presented at disposition and the court's remaining findings, as we shall now address.

Respondent-mother argues that the district court did not make sufficient findings regarding the factors set forth in N.C.G.S. § 7B-1110(a). Specifically, she contends that the district court should have made findings concerning the likelihood of Peter's adoption; the bond between Peter and respondent-mother; and the quality of the relationship between Peter and the proposed adoptive parent, guardian, custodian, or other placement. *See* N.C.G.S. § 7B-1110(a)(2), (4), (5).

"It is clear that a [district] court must *consider* all of the factors in section 7B-1110(a). . . . The statute does not, however, explicitly require written findings as to each factor." *In re A.U.D.*, 832 S.E.2d 698, 702 (N.C. 2019). We agree with the Court of Appeals that the district court is only required to make written findings regarding those factors that are relevant. *In re D.H.*, 232 N.C. App. 217, 221, 753 S.E.2d 732, 735 (2014). We also agree with the Court of Appeals that "a factor is 'relevant' if there is 'conflicting evidence concerning' the factor, such that it is 'placed in issue by virtue of the evidence presented before the [district] court[.]' " *In re H.D.*, 239 N.C. App. 318, 327, 768 S.E.2d 860, 866 (2015) (quoting *In re D.H.*, 232 N.C. App. at 222 n.3, 753 S.E.2d at 735 n.3).

In the present case, the transcript of the hearing demonstrates that the district court properly considered the appropriate factors. The

district court found that Peter was almost nine years old and that the termination of respondent-mother's parental rights would aid in achieving the permanent plan of adoption. *See* N.C.G.S. § 7B-1110(a)(1), (3). With regard to N.C.G.S. § 7B-1110(a)(2), there was no conflict in the evidence regarding the likelihood of Peter's adoption. The DSS social worker testified that, although Peter was not currently in a pre-adoptive placement, the goal was to get him to a "point of stability that we can secure a pre-adoptive placement for him." The social worker went on to testify that there would be a greater likelihood for Peter to be adopted or to be in an adoptive placement once he became available for adoption, and that there was no reason to believe that he could not eventually be adopted. We believe that the district court made the requisite finding regarding the factor addressed in N.C.G.S. § 7B-1110(a)(4) when it found that any previous bond or relationship with the respondent-mother was outweighed by Peter's need for permanence. Lastly, as to N.C.G.S. § 7B-1110(a)(5), the district court was not required to make a finding regarding the quality of the relationship between Peter and the proposed adoptive parent, guardian, custodian, or other permanent placement, since there was no potential adoptive parent at the time of the hearing. *See In re D.H.*, 232 N.C. App. at 223, 753 S.E.2d at 736 ("[T]he absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights.").

In addition to the statutory factors set out in N.C.G.S. § 7B-1110(a)(1)–(5), the district court considered other relevant factors, as it was permitted to do under N.C.G.S. § 7B-1110(a)(6), such as the facts that Peter had been in his therapeutic placement since September 2018 and was doing well in the placement; Peter had a strong bond with his current foster family and was forming a long-term attachment to the family; Peter was receiving structure and stability from the foster family; Peter needed permanence and continued therapy; and respondent-mother was no longer participating in Peter's therapy and had not called to inquire about Peter's welfare. Based on the foregoing analysis, we are satisfied that the district court's conclusion that termination of respondent-mother's parental rights was in Peter's best interest was neither arbitrary nor manifestly unsupported by reason.

For the reasons stated above, we affirm the 12 December 2018 order of the district court terminating respondent-mother's parental rights.

AFFIRMED.

IN RE I.G.C.

[373 N.C. 201 (2019)]

IN THE MATTER OF I.G.C., J.D.D.

No. 105A19

Filed 6 December 2019

1. Termination of Parental Rights—neglect and willful abandonment—case plan compliance—limited progress

The trial court's order terminating a mother's parental rights to her children on the basis of neglect and willful abandonment was affirmed where the court's findings that the mother did not maintain stable employment or housing for at least six months and that she did not complete the recommended treatment for substance abuse and domestic violence were supported by competent evidence, and where the mother admitted to not feeling comfortable being reunified with her children until a much later date for fear of suffering a relapse. The findings of fact supported the trial court's conclusion that the mother had not made reasonable progress on her case plan, which in turn supported the grounds for termination of parental rights.

2. Termination of Parental Rights—no-merit brief—neglect and willful abandonment

The trial court's termination of a father's parental rights to his children for neglect and willful abandonment was affirmed where the father's counsel filed a no-merit brief. The trial court's order was supported by competent evidence and based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 2 January 2019 by Judge F. Warren Hughes in District Court, Madison County. This matter was calendared in the Supreme Court on 7 November 2019 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Hockaday & Hockaday, P.A., by Daniel M. Hockaday, for petitioner-appellee Madison County Department of Social Services.

Patrick, Harper & Dixon, LLP, by Amanda C. Perez, for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, by J. Lee Gilliam, Assistant Parent Defender, for respondent-appellant father.

Edward Eldred for respondent-appellant mother.

MORGAN, Justice.

Respondents, the parents of the minor children I.G.C. (Ivy) and J.D.D. (Jacob)[1] (collectively, the children), appeal from the district court's orders terminating their parental rights. We conclude that the district court made sufficient findings of fact, based on clear, cogent, and convincing evidence, to support the court's conclusions that grounds existed to terminate respondents' parental rights, and that such termination was in the children's best interests. Accordingly, we affirm the district court's orders.

Factual Background and Procedural History

On 27 September 2016, the Madison County Department of Social Services (DSS) filed petitions alleging that Ivy and Jacob were neglected and dependent juveniles. DSS had received a report on 6 September 2016, indicating that respondent-mother was drinking alcohol, using methamphetamines on a daily basis, and driving with the children while she was intoxicated. After DSS initiated a case to investigate this report, respondent-mother twice drove to the DSS office after drinking, registering a .07 reading on the breathalyzer test on one occasion and a .03 reading on the other. Ivy disclosed to DSS an incident during which respondent-mother drank "a little" and then hit a guardrail with Ivy in the vehicle. The female juvenile further disclosed that respondents had a "big fight" with each other while at a birthday party. Respondent-mother reported to DSS that respondent-father consumed alcohol, used methamphetamines, and smoked crack cocaine. DSS obtained nonsecure custody of both juveniles.

On 4 November 2016, the district court entered an order which adjudicated Ivy and Jacob as dependent juveniles. Although respondents both consented to an adjudication of neglect based upon the facts alleged in the petition and recounted above, the district court dismissed the neglect allegations. The dependency order from the district court, however, incorporated, *inter alia*, the above-stated facts as the basis for the children's removal from respondents' home and ordered respondents to enter into case plans with DSS within ten days of the trial court's adjudication order. The children remained in the custody of DSS. Respondent-mother's case plan contained eleven requirements designed to address her issues with parenting, substance abuse, mental health, domestic violence, stable housing, and employment. As part of the case

1. Pseudonyms are used to protect the identity of the juveniles and for ease of reading.

plan, respondent-mother was not to incur any new criminal charges and was required to attend all scheduled visitations and team meetings with DSS. Respondent-father's case plan included similar requirements.

On 23 October 2017, the district court entered a permanency planning order which found that respondents had only made minimal progress toward completing their respective case plans. The permanent plan was set as adoption, with a concurrent plan of guardianship. The district court relieved DSS of further reunification efforts and ordered DSS to file termination of parental rights petitions within sixty days.

On 18 January 2018, DSS filed motions in the cause to terminate respondents' parental rights on the grounds of neglect, willfully leaving the children in a placement outside the home for more than twelve months without making reasonable progress in correcting the removal conditions, and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (2), (7) (2017). The termination hearing was conducted during the time period of 25-26 September 2018. On 2 January 2019, the district court entered orders finding that the evidence established facts sufficient to support the termination of both respondents' parental rights pursuant to N.C.G.S. § 7B-1111(a)(1)–(2). The district court also concluded that it was in the children's best interests for the parents' rights to be terminated and therefore, terminated respondents' parental rights. Each respondent appealed to this Court pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1).

Respondent-mother's Appeal

[1] Respondent-mother argues that the district court erred by concluding that grounds existed to terminate her parental rights. She contends that the district court's ultimate findings and conclusions as to grounds for termination were unsupported in light of the evidence presented regarding the progress that respondent-mother had made in completing her case plan by the time of the termination hearing. We disagree.

A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2017); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under section 7B-1111(a) of our General Statutes. N.C.G.S. § 7B-1109(e), (f). We review a district court's adjudication "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253 (citing *In re Moore*,

306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). If the petitioner meets its burden during the adjudicatory stage, "the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110).

Section 7B-1111(a)(2) allows for the termination of parental rights if "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2).

Respondent-mother's limited achievements in correcting the circumstances that led to the removal of the children throughout the history of this case are well-documented in the district court's findings of fact. She appears to tacitly accept that the district court's finding that she "made minimal progress on her DSS case plan . . . until after the [c]ourt[-]ordered efforts ceased in September[ ] 2017" was supported by the evidence. Respondent-mother concedes that the court properly found that she never completed a substance abuse intensive outpatient program (SAIOP) or inpatient substance abuse treatment, as recommended, never completed a recommended eighteen-week domestic violence program, missed seventeen of thirty-nine drug screens and tested positive on two other occasions, and committed two driving while intoxicated (DWI) offenses after she entered into the case plan.

Respondent-mother does, however, challenge the content and the context of many of the district court's findings regarding her progress between the court's cessation of reunification efforts and the termination hearing. We limit our review of challenged findings to those that are necessary to support the district court's determination that the stated ground existed to terminate respondent's parental rights. *In re T.N.H.*, 831 S.E.2d 54, 58–59 (N.C. 2019) (citing *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133).

First, respondent-mother argues that the district court incorrectly found that she had not maintained stable employment for a minimum of six months. This argument is contrary to respondent-mother's own testimony at the termination hearing, in which she acknowledged that, after a five-month gap in employment, she started a job at Dollar Tree in April 2018, less than six months before the termination hearing.

Respondent-mother next asserts that the district court erred by finding that she failed to obtain stable housing for at least six months. She candidly acknowledges that the court correctly found that she had "moved at least four (4) times during the pendency of this case," yet represents that her frequent residential changes did not signal instability. Respondent-mother also claims that she had been residing at her current address for six months. The district court found that respondent-mother had been living at her current residence since April 2018. The termination hearing occurred at the end of September 2018, meaning that respondent-mother was days shy of having resided at the residence for the designated six-month minimum period of time. In light of this computation of time, respondent-mother had not yet fully achieved a full six-months of stable housing, thus verifying the correctness of the district court's finding on this matter. Moreover, the district court did not err in interpreting respondent-mother's frequent moves as further evidence of housing instability.

Respondent-mother further urges us to determine that the district court's findings were improper in that its assessment of her progress with parenting skills and substance abuse, mental health, and domestic violence treatment did not fairly credit the progress that she had made in these areas. Indeed, although the court found that respondent-mother had completed multiple parenting courses, had participated in treatment for substance abuse and domestic violence, and had achieved three recent negative drug screens, the district court also found that the substance abuse and domestic violence treatments were at a lower level of duration and intensity than recommended and were never approved by the tribunal. For instance, instead of the eighteen-week substance abuse program required by her case plan, respondent-mother only "participated in a six[-]week program with a non-licensed therapist[.]" Respondent-mother also never completed an SAIOP or inpatient substance abuse treatment. Thus, while respondent-mother was making some progress as of the time of the termination hearing, it was not the level of progress required by her case plan. By respondent-mother's own admission during the termination hearing, she would not feel comfortable having the children returned to her care for another "year, year and a half" because she feared the possibility that she would relapse. While respondent-mother was getting closer to completing various aspects of her case plan such as maintaining stable housing and employment, she still failed to complete the recommended treatment needed to fully address the core issues of substance abuse and domestic violence which had played the largest roles in the children's removal.

The district court's findings reflect that it considered all of respondent-mother's efforts up to the time of the termination hearing, weighed the evidence before it, and then made findings which showed that respondent-mother waited too long to begin working on her case plan and that, as a result, she had not made reasonable progress toward correcting the conditions that led to the children's removal by the time of the termination hearing. Therefore, the court properly concluded that respondent-mother's rights should be terminated based upon that failure.

The district court's conclusion that the ground of failure to make reasonable progress existed pursuant to N.C.G.S. § 7B-1111(a)(2) is sufficient in and of itself to support termination of respondent-mother's parental rights. *See In re T.N.H.*, 831 S.E.2d at 62. Furthermore, respondent-mother does not challenge the court's conclusion that termination of her parental rights was in her children's best interests. *See* N.C.G.S. § 7B-1110(a). Accordingly, we affirm the district court's orders terminating respondent-mother's parental rights.

Respondent-father's Appeal

[2] Counsel for respondent-father has filed a no-merit brief on behalf of this parent pursuant to N.C. R. App. P. 3.1(e). Counsel has advised respondent-father of his right to file pro se written arguments on his own behalf and has provided respondent-father with the documents necessary to do so. Respondent-father has not submitted any written arguments to this Court.

We independently review issues contained in a no-merit brief filed pursuant to Rule 3.1(e). *In re L.E.M.*, 831 S.E.2d 341, 345 (N.C. 2019). Respondent-father's attorney filed a twenty-two-page brief in which counsel identified three issues that could arguably support an appeal, but also explained why counsel believed that each of the issues lacked merit. Based upon our careful review of the issues identified in the no-merit brief in light of our consideration of the entire record, we are satisfied that the district court's 2 January 2019 orders were supported by competent evidence and based on proper legal grounds. Consequently, we affirm the district court's orders terminating respondent-father's parental rights.

AFFIRMED.

IN RE Z.V.A.

[373 N.C. 207 (2019)]

IN THE MATTER OF Z.V.A.

No. 180A19

Filed 6 December 2019

1. Termination of Parental Rights—competency of parent—intellectual disability

In a termination of parental rights case, the trial court did not abuse its discretion by not conducting an inquiry into a mother's competency where the mother had a mild intellectual disability but had been able to work and attend school.

2. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect

The trial court's conclusion that a father's parental rights were subject to termination based on neglect was supported by the evidence where the father was willing to leave the child alone with her mother even though the mother was unfit for such responsibility, the parents exhibited marital discord during supervised visits with their child, and the parents intended to remain together.

3. Termination of Parental Rights—judicial bias—permanent plan—adoption—child's best interest

The Supreme Court rejected an argument that the trial court was unfairly biased against parents in a termination of parental rights case where the trial court made a statement regarding its previous decision to send the child to live with her out-of-state aunt. At the time of that decision, the district court had already changed the primary permanent plan to adoption, and the statement in question was merely an explanation that the court had decided those steps were in the child's best interest at the time—rather than a definitive decision to terminate the parents' rights months before the termination hearing.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 1 March 2019 by Judge J.H. Corpening II in District Court, New Hanover County. This matter was calendared in the Supreme Court on 7 November 2019 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jill Cairo for petitioner-appellee Social Services of New Hanover County and K&L Gates LLP, by Abigail F. Williams, for appellee Guardian ad Litem.

David A. Perez for respondent-appellant father.

Richard Croutharmel for respondent-appellant mother.

MORGAN, Justice.

Respondent-father, who is the legal father of the minor child Z.V.A. (Zoey[1]), and respondent-mother appeal from the district court's order terminating their parental rights to Zoey. We affirm.

Factual Background and Procedural History

On 15 December 2016, the New Hanover County Department of Social Services (DSS) received a Child Protective Services report regarding three-day-old Zoey. The report indicated that there was domestic violence between respondent-parents, that respondent-father had issues with alcohol and assaultive behavior, and that respondent-mother had developmental and cognitive issues. In response to the report, DSS began providing in-home services to the family. DSS had previously worked with respondent-parents from 2012 to 2015 in an attempt to address issues with an older child. However, the previous case ended with respondent-father relinquishing his parental rights to the older child and respondent-mother having her parental rights terminated by order of the court.

On 30 March 2017, a DSS social worker visiting respondent-parents' residence noticed that respondent-mother had recently been crying. When asked about her emotional state, respondent-mother reported that respondent-father had become angry and had struck respondent-mother while she was putting Zoey down for a nap. On 3 April 2017, DSS filed a petition alleging that Zoey was a neglected and dependent juvenile. Zoey was placed in the nonsecure custody of DSS.

On 12 July 2017, the district court entered an order adjudicating Zoey as a neglected juvenile based on findings of fact to which respondent-parents stipulated. Respondent-parents were both ordered to complete psychological evaluations and vocational rehabilitation

1. A pseudonym is used to protect the identity of the minor child and for ease of reading.

services, and to comply with any resulting recommendations; to engage in parenting education programs; to refrain from drug and alcohol use; and to provide an adequate living environment for Zoey. Respondent-father was additionally ordered to participate in paternity testing and to engage in domestic violence programs. Zoey remained in DSS custody.

On 22 June 2018, the district court entered a permanency planning order. The district court detailed the progress made by respondent-parents on their respective case plans. The district court also found that respondent-parents were unable to translate what they supposedly learned while working their case plans into successfully changing their behaviors, and as a result, Zoey could not be returned to the family home. The district court set the permanent plan as adoption with a concurrent plan of reunification and ordered DSS to proceed with termination of respondents' parental rights.

On 2 July 2018, DSS filed a petition to terminate respondents' parental rights pursuant to N.C.G.S. § 7B-1111(a)(1)–(2) (2017). On 10 July 2018, Zoey was placed with her maternal aunt in New Jersey.

The termination hearing was conducted from 29–31 October 2018. On 1 March 2019, the district court entered an order finding that the evidence established facts sufficient to support the termination of both respondents' parental rights pursuant to N.C.G.S. § 7B-1111(a)(1).[2] The district court also concluded that it was in Zoey's best interest for her parents' rights to be terminated and thereupon, terminated respondents' parental rights. Respondents each gave timely notice of appeal to this Court pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1).[3]

Respondent-Mother's Competency

[1] Respondent-mother argues that the district court abused its discretion by failing to address whether she required a guardian *ad litem* under N.C.G.S. § 1A-1, Rule 17 (2017). Respondent-mother contends that the evidence presented at the termination hearing demonstrated that she was unable to manage her own affairs. In our view, the district court did not abuse its discretion here.

Section 7B-1101.1(c) of the North Carolina General Statutes permits the district court, either on the motion of a party or on its own motion,

2. The district court dismissed the other ground for termination alleged by DSS.

3. Evidence was presented that respondent-father was not Zoey's biological father, but no biological father was able to be identified. The rights of the putative biological father and any unknown fathers were also terminated by the district court, but they are not parties to this appeal.

to appoint a guardian *ad litem* for an incompetent parent. An incompetent adult is defined as one "who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C.G.S. § 35A-1101(7) (Supp. 2018).

District "court decisions concerning both the appointment of a guardian *ad litem* and the extent to which an inquiry concerning a parent's competence should be conducted are reviewed on appeal using an abuse of discretion standard." *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015). "An '[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (alteration in original) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). As this Court has previously explained, the district court is afforded substantial deference with respect to its decisions involving a party's competence, because it "actually interacts with the litigant whose competence is alleged to be in question and has, for that reason, a much better basis for assessing the litigant's mental condition than that available to the members of an appellate court, who are limited to reviewing a cold, written record." *Id.* at 108, 772 S.E.2d at 456. Thus,

> when the record contains an appreciable amount of evidence tending to show that the litigant whose mental condition is at issue is not incompetent, the [district] court should not, *except in the most extreme instances*, be held on appeal to have abused its discretion by failing to inquire into that litigant's competence.

Id. at 108–09, 772 S.E.2d at 456 (emphasis added).

The instant case does not present such an extreme instance. As reflected by the record evidence underlying the district court's unchallenged findings of fact, although respondent-mother's approximate IQ of 64 indicates a mental disability, the psychologist who examined respondent-mother diagnosed her with only a "mild intellectual disability" because respondent-mother had been able to work and to attend school. Moreover, the district court found that respondent-mother demonstrated that she had developed adaptive skills to lessen the impact of her disability, and that while working on her case plan, respondent-mother completed empowerment classes to help address the issues of domestic violence in her relationship. The evidence

which supported these findings of fact does not suggest that respondent-mother's disability rose to the level of incompetence so as to require the appointment of a guardian *ad litem* to safeguard respondent-mother's interests. Accordingly, we conclude that the district court did not abuse its discretion when it did not conduct an inquiry into respondent-mother's competency.

Adjudication of Neglect as to Respondent-Father

[2] Respondent-father argues that no clear, cogent and competent evidence supports the district court's findings of fact which in turn led to its conclusion of law that his parental rights should be terminated based upon his neglect of Zoey.

Termination of parental rights proceedings consist of two stages: adjudication and disposition. N.C.G.S. §§ 7B-1109, -1110 (2017); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner must prove by "clear, cogent, and convincing evidence" that one or more grounds for termination exist under section 7B-1111(a) of our General Statutes. N.C.G.S. § 7B-1109(e), (f) (2017). Thus, we review a district court's adjudication "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). Unchallenged findings of fact made at the adjudicatory stage are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citing *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962)). If the petitioner proves at least one ground for termination during the adjudicatory stage, "the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110).

Pursuant to Section 7B-1111(a)(1), termination of parental rights is proper where a district court finds a parent has neglected his or her child to such an extent that the child is a "neglected juvenile." N.C.G.S. § 7B-1111(a)(1). For purposes of a termination proceeding, a neglected juvenile is, *inter alia*, one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C.G.S. § 7B-101(15) (Supp. 2018).

When it cannot be shown that a parent is neglecting his or her child at the time of the termination hearing because "the child has been

separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167 (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984)). Respondent-father here does not dispute that there was past neglect in this case; he challenges only the district court's determination that future neglect is likely if Zoey were to be returned to his care. When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing. *In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232. "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *Id.*

The district court's determination in the present case that neglect would likely be repeated if Zoey was returned to respondent-father was intrinsically linked to respondent-father's inability to sever his relationship with respondent-mother. The unchallenged findings of fact reflect that respondent-mother struggled with basic parenting skills and relied on respondent-father as a main support for parenting. Although respondent-mother failed to demonstrate that she could independently parent Zoey safely and appropriately, respondent-father would not commit to DSS that he would not leave Zoey alone with respondent-mother, and he declined to have visitation with Zoey separately from respondent-mother.

Respondent-father notes that he testified during the termination hearing that he did not fully understand how his unwillingness to ensure that Zoey was not left alone with respondent-mother was affecting his ability to have Zoey returned to him. He further stated that he would yield on this issue if it meant he could retain his parental rights. However, the district court was not required to credit this testimonial evidence, particularly in light of other testimony admitted during the hearing. *See In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68 ("[The district court] judge ha[s] the responsibility to 'pass[ ] upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom.' " (second alteration in original) (quoting *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968)).

In other portions of his testimony, respondent-father acknowledged that he had multiple conversations with the social worker about respondent-mother's parenting limitations and that respondent-father had responded to DSS's concerns by advocating for respondent-mother

to be given another chance at parenting. The DSS social worker testified that respondent-father would not promise her that he would not leave Zoey alone in respondent-mother's care, even though he was repeatedly asked to make that promise. Based on these repeated interactions and respondent-father's consistent view toward this concern of DSS, the district court could properly assume that respondent-father would allow Zoey to be left alone in respondent-mother's care in the future.

This caution exercised by DSS for Zoey's well-being was amplified when respondent-father and respondent-mother would parent Zoey together during visits and legitimized its position about respondent-mother's interactions with the child. The district court made unchallenged findings of fact that during such parental visits, respondent-father would speak to respondent-mother "in an aggressive, harsh and negative manner" and that he used his body to invade respondent-mother's personal space. In response, respondent-mother would do things intended to upset respondent-father. The social worker testified that these types of behaviors continued throughout the social worker's supervised visits of respondent-parents with Zoey. Even after respondent-parents engaged in counseling together, the social worker felt that "they weren't putting . . . into practice" what they had learned. Based on this testimony, the district court found that "when challenges arise in the relationship, [respondents] are not able to use any of the learned skills to communicate or deal with each other in a more positive and effective manner." Despite this, they both intended to remain in their relationship.

The district court's findings that respondent-father was willing to leave Zoey alone in the care of respondent-mother even though respondent-mother was unfit for such accountability, that respondent-parents continued to be in constant marital discord even while having supervised visits with Zoey, and that respondent-parents intended to remain together despite the aforementioned problems, provided an adequate basis for the court's determination that Zoey would likely be neglected again if she were returned to respondent-father's care. As such, clear, cogent, and competent evidence supported the district court's findings of fact which in turn supported the conclusion that respondent-father's parental rights were subject to termination under N.C.G.S. § 7B-1111(a)(1).

Judicial Bias

[3] Finally, both respondent-parents argue that the district court was unfairly biased against them as reflected by the following comments made by the court during the oral announcement of its ruling on the child Zoey's best interest:

> But one of the reasons that I was willing to make the commitment that I made in sending that child – this child – to Newark was what I heard from [the maternal aunt]. And sort of the rest of that story is that I would never have sent this child to live in Newark if I thought that she could be with her parents. Because that creates a distance barrier for these folks that is practically insurmountable. So that's – when I said yes to Newark then that was – that was sort of my point of saying "there's not – there's not any coming back from this." That's part of why they call them permanency planning hearings. Right? So I – I do find that it's in [Zoey]'s best interest for the parental rights of her mom, her legal father, putative father, and any unknown fathers to be terminated.

Respondent-parents contend that this statement regarding the district court's decision to send Zoey to live with her aunt in July 2018—implemented more than four months before the termination hearing—demonstrates that the district court had prejudged the termination case, and therefore should have disqualified itself *sua sponte* from the matter.

Normally, as respondent-parents both acknowledge, a court is not required to recuse itself absent a motion from a party, and when no such motion is made, the issue is not preserved for appellate review. *See*, *e.g.*, *In re D.R.F.*, 204 N.C. App. 138, 144, 693 S.E.2d 235, 240 (2010) ("When a party does not move for a judge's recusal at trial, the issue is not preserved for our review."); *see also* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]"). However, under the circumstances of this case, we elect in our discretion to invoke North Carolina Rule of Appellate Procedure 2 and address respondent-parents' arguments. *See* N.C. R. App. P. 2.

Canon 3C(1) of the North Carolina Code of Judicial Conduct states: "On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned[.]" In arguing that the district court's impartiality could reasonably be questioned based on its statement during its ruling on the best interest phase of this termination of parental rights proceeding, respondents conveniently reconstruct the statement at issue. When Zoey was sent to live with her maternal aunt in New Jersey on 10 July 2018, the district court had already changed the primary permanent plan to adoption and ordered DSS to file a termination petition, which the agency had done a few days earlier. Viewed in this light, the district court's

statement during its ruling was merely an explanation that the court had previously taken those steps because it had determined that they were in Zoey's best interest at the time those actions were taken. If the bias alleged here were to be deemed to exist as depicted by respondent-parents and ultimately to require recusal, then the illogical consequence would follow that a district court would not ever be able to preside over a termination hearing after it had previously set the permanent plan for a juvenile as a plan that would imply or be compatible with termination, because of the inherent implication of bias which would be ascribed to a district court's decision to adopt such a plan. Therefore, considered in context, the district court's ultimate decision here to terminate the parental rights of respondent-parents was wholly consistent with the evidence presented at the termination hearing and nothing in the above-quoted statement of the district court reflects that it had definitively reached a conclusion to terminate respondent-parents' rights to their child Zoey prior to the termination hearing. Indeed, in discerning the district court's execution of fairness and impartiality in its ruling in this case as we resolve the issue of bias, it is worthy to note that the district court dismissed one of the grounds for termination alleged by DSS. In sum, respondent-parents have not shown that the district court had a duty to recuse itself from hearing the termination case.

For the reasons discussed herein, we affirm the district court's termination order.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
THOMAS CRAIG CAMPBELL

No. 252PA14-3

Filed 6 December 2019

Larceny—sufficiency of evidence—direct link between defendant and stolen property—opportunity alone

The State failed to present sufficient evidence to convict defendant of felony larceny where the evidence showed that while defendant had an opportunity to take audio equipment from a church which was left unlocked over a four-day time span, it did not establish a link between defendant and the stolen property or that defendant was in the church when the property was stolen.

Appeal pursuant to N.C.G.S. § 7A-30(2) and N.C.G.S. § 7A-31 from the decision of a divided panel of the Court of Appeals, 810 S.E.2d 803 (N.C. Ct. App. 2018), vacating and remanding a judgment entered on 12 June 2013 by Judge Linwood O. Foust in Superior Court, Cleveland County. Heard in the Supreme Court on 2 October 2019 in session in the Forsyth County Hall of Justice in the City of Winston-Salem pursuant to section 18B.8 of Chapter 57 of the 2017 Session Laws of the State of North Carolina.

Joshua H. Stein, *Attorney General*, *by Teresa M. Postell*, *Assistant Attorney General*, *for the State.*

Glenn Gerding, *Appellate Defender*, *by Hannah Hall Love*, *Assistant Appellate Defender*, *for defendant-appellee.*

DAVIS, Justice.

In this case, we consider whether the State met its burden of presenting sufficient evidence for the jury to convict defendant of felony larceny. Because we conclude that insufficient evidence existed to support the larceny charge, we modify and affirm the Court of Appeals' decision vacating his conviction.

Factual and Procedural Background

This case is before us for the third time. The relevant facts were set out in our first opinion in this case as follows:

On 8 October 2013, the Cleveland County Grand Jury indicted defendant for felony breaking or entering a place of worship and felony larceny after breaking or entering. The larceny indictment specifically alleged that, on 15 August 2012, defendant stole "a music receiver, microphones and sounds system wires, the personal property of Andy Stevens and Manna Baptist Church, ... in violation of N.C.G.S. [§] 14–54.1(a)." Defendant pled not guilty.

At trial, the State's evidence showed that at the conclusion of Sunday services on 19 August 2012, Pastor Andy Stevens of Manna Baptist Church discovered that some audio equipment was missing. Pastor Stevens lives on the Manna Baptist Church property. He testified that the church doors may have been inadvertently left unlocked on 15 August, following Wednesday evening services. When the church secretary arrived the next morning, she locked the doors, and they remained locked until Sunday morning. Although there was no sign of forced entry, Pastor Stevens found defendant's wallet in the baptistry changing area at the back of the church close to where some of the missing equipment previously had been located.

A detective testified that she spoke with defendant at the Cleveland County Detention Center, where he was being held on an unrelated charge. When defendant learned the detective wished to speak with him, he said, "[T]his can't possibly be good. What have I done now that I don't remember?" Defendant then admitted to being at Manna Baptist Church the night the doors were left unlocked. He said he was on "a spiritual journey" and "had done some things," but "did not remember what he had done" in the church.

At the close of the State's evidence, the trial court denied defendant's motion to dismiss the charges based on insufficient evidence. Defendant then testified on his own behalf. He stated that on the night in question, he was asked to leave the house in which he was living, so he packed a duffle bag with his clothes and started walking toward a friend's house. Along the way, he dumped the bag in a ditch because it was too heavy to

carry. Defendant arrived at his friend's house around midnight. When his friend's girlfriend asked him to leave, he kept walking until he reached Manna Baptist Church. Defendant noticed that the door to the church was cracked open. He was thirsty from walking all night, so he entered the church with the intent to find water and sanctuary. Defendant stated that once inside, he prayed, slept, "tried to do a lot of soul searching," and drank a bottle of water, although he admitted he was "not really sure exactly what [he] did the whole time [he] was" in the church. He also testified that he "did not take anything away from the church" when he left at daybreak.

After leaving the church, defendant felt chest pains, so he called 9-1-1. Defendant testified that he was taking a host of medications at the time, including a psychotropic drug, for his heart condition, stress disorder, bipolar condition, and diabetes. An Emergency Medical Technician ("E.M.T.") responded to the call around 6:30 a.m. on Thursday. The E.M.T. testified that defendant said he had been "wandering all night," that defendant looked "disheveled" and "worn out," and that defendant's "shoes were actually worn through the soles." The E.M.T. did not see defendant carrying anything.

At the close of evidence, defendant renewed his motion to dismiss for insufficient evidence, which the trial court again denied. The jury found defendant guilty of felony larceny and felony breaking or entering a place of religious worship, and defendant appealed.

State v. Campbell, 368 N.C. 83, 84–85, 772 S.E.2d 440, 442–43 (2015) (*Campbell I*) (alterations in original).

Defendant appealed his convictions to the Court of Appeals, where he raised six issues. The Court of Appeals addressed only two of his arguments, holding that (1) his indictment for larceny was deficient because it failed to allege that Manna Baptist Church was an entity capable of owning property; and (2) the State had failed to present sufficient evidence of an essential element of felony breaking or entering—intent to commit larceny. *State v. Campbel*l, 234 N.C. App. 551, 555–61, 759 S.E.2d 380, 383–87 (2014).

We allowed the State's petition for discretionary review and proceeded to reverse the Court of Appeals' decision. First, we held that

the larceny indictment was, in fact, legally adequate. *Campbell I*, 368 N.C. at 86–87, 772 S.E.2d at 443–44. Second, we ruled that sufficient evidence was presented at trial to allow the jury to convict defendant of felony breaking or entering a place of religious worship. *Id.* at 87–88, 772 S.E.2d at 444. Accordingly, we reversed the Court of Appeals' decision and remanded the case to that court for consideration of the remaining issues defendant had raised with regard to his conviction for larceny. *Id.* at 88, 772 S.E.2d at 445.

On remand, the Court of Appeals focused its analysis on defendant's argument that a fatal variance existed between the indictment for larceny and the evidence presented by the State. The Court of Appeals first determined that although defendant had not preserved his fatal variance argument at trial due to his failure to move for the dismissal of the larceny charge on that ground, consideration of defendant's fatal variance argument was nevertheless appropriate based upon the invocation of Rule 2 of the North Carolina Rules of Appellate Procedure.[1] *State v. Campbell*, 243 N.C. App. 563, 571, 777 S.E.2d 525, 530 (2015).

Having decided to invoke Rule 2, the Court of Appeals then addressed the merits of defendant's argument and determined that a fatal variance did exist because although the indictment alleged two owners of the stolen property (Andy Stevens and Manna Baptist Church), the evidence at trial established that only the church was the owner of the missing items. *Id.* at 577–78, 777 S.E.2d at 534. For this reason, the Court of Appeals vacated defendant's larceny conviction. *Id.*

The State once again petitioned this Court for discretionary review, which we allowed. We reversed the Court of Appeals' second decision and remanded the case back to that court in order for it to "independently and expressly determine whether, on the facts and under the circumstances of this specific case, to exercise its discretion to employ Rule 2 of the North Carolina Rules of Appellate Procedure . . . and consider the merits of defendant's fatal variance argument." *State v. Campbell*, 369 N.C. 599, 604, 799 S.E.2d 600, 603 (2017) (*Campbell II*).

Following our remand, the Court of Appeals issued a third opinion in which it reaffirmed its decision to invoke Rule 2 in order to review

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1. Rule 2 provides that "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions." N.C. R. App. P. 2.

the fatal variance claim and concluded once again that a fatal variance existed between the indictment and the evidence at trial. *State v. Campbell*, 810 S.E.2d 803, 818–20 (N.C. App. 2018). After so holding, the Court of Appeals proceeded—based on principles of judicial economy—to also address the additional issues of whether sufficient evidence existed to support defendant's larceny conviction and whether the trial court violated his right to a unanimous verdict in connection with the larceny charge. *Id.* at 820. The Court of Appeals determined that the State's evidence was insufficient to raise a jury question on the larceny charge. *Id.* at 820–23.[2]

Judge Berger dissented from the majority's rulings. In his dissent, he stated his belief that the majority had erred in invoking Rule 2 under the circumstances of this case. *Id.* at 823–25 (Berger, J., dissenting). He further expressed his belief that substantial evidence existed to support defendant's larceny conviction and that defendant had not been deprived of his right to a unanimous verdict. *Id.* at 826–27 (Berger, J., dissenting).

Based on Judge Berger's dissent, the State appealed as of right to this Court pursuant to N.C.G.S. § 7A-30(2). In addition, we allowed the State's petition for discretionary review as to additional issues pursuant to N.C.G.S. § 7A-31.

Analysis

The bulk of the parties' arguments in this latest appeal concern the questions of whether the Court of Appeals properly invoked Rule 2 in order to reach the fatal variance issue and, in turn, whether a fatal variance actually existed. We believe, however, that we need not resolve either of those issues based on our determination that the Court of Appeals correctly held the State failed to present sufficient evidence to support the larceny charge.

When reviewing a defendant's motion to dismiss for insufficient evidence, a court must inquire "whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). Substantial evidence exists when "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Barnette*, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981). In other

2. The Court of Appeals then provided a brief discussion regarding defendant's "unanimous verdict" argument but ultimately declined to definitively rule upon that issue given its prior determination that the larceny conviction should be vacated on other grounds. *Id.* at 823.

words, substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

However, if the evidence is sufficient "only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). This is true even if "the suspicion so aroused by the evidence is strong." *Id.* at 98, 261 S.E.2d at 117. When considering such a motion, a court must view the evidence in the light most favorable to the State and give the State the benefit of all reasonable inferences. *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004).

The essential elements of larceny are that the defendant "(1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently." *State v. Reid*, 334 N.C. 551, 558, 434 S.E.2d 193, 198 (1993) (quoting *State v. Perry*, 305 N.C. 225, 233, 287 S.E. 2d 810, 815 (1982)). In order to withstand a defendant's motion to dismiss, the State must present substantial evidence of each of these elements and "that the defendant is the perpetrator" of the larceny. *See Call*, 349 N.C. at 417, 508 S.E.2d at 518.

Based on our thorough review of the record in this case, we agree with the Court of Appeals that the State failed to present sufficient evidence that defendant took and carried away the missing items. *See State v. Campbell*, 810 S.E.2d 803, 820–23 (N.C. Ct. App. 2018). Rather, the evidence simply established that defendant had an *opportunity* to steal the equipment at issue while he was in the church. Under well-settled caselaw, evidence of a defendant's mere opportunity to commit a crime is not sufficient to send the charge to the jury.

Several of our prior decisions illustrate the principle that a conviction cannot be sustained if "[t]he most the State has shown is that defendant had been in an area where he could have committed the crimes charged." *State v. Minor*, 290 N.C. 68, 75, 224 S.E.2d 180, 185 (1976). In *Minor*, defendant Minor and his co-defendant Ingram were charged with the possession of marijuana for the purpose of distribution after marijuana plants were found growing in Ingram's corn field. *Id.* at 73, 224 S.E.2d at 184. The two had been initially pulled over and arrested while driving near the field, and a search of their vehicle revealed several wilted marijuana leaves and some fertilizer. *Id.* at 72, 224 S.E.2d at 183–84. It was further determined that the defendant had previously

used the cornfield to raise garden crops, and a bottle with the name "Minor" on it was found at an old house near the field. *Id.* We summarized the State's evidence as follows:

> About all our evidence shows is (1) that defendant Minor had been a visitor at an abandoned house leased or controlled by co-defendant Ingram; (2) that the marijuana field was 100 feet away from the house but obscured by a wooded area; (3) that the marijuana field was accessible by three different routes; (4) that on the date of Minor's arrest he was on the front seat of a Volkswagen automobile owned and operated by Ingram, where some wilted marijuana leaves were found on the left rear floorboard and one marijuana leaf was found in the trunk.

Id. at 74–75, 224 S.E.2d at 185. We concluded that this evidence was insufficient to sustain the defendant's conviction for possession for the purpose of distribution, because—at most—the State had simply shown that the "defendant had been in an area where he could have committed the crimes charged. Beyond that, we must sail in a sea of conjecture and surmise." *Id.*

We similarly applied this principle in *State v. Murphy*, 225 N.C. 115, 33 S.E.2d 588 (1945). In *Murphy*, the two defendants assaulted a victim and left him unconscious in the street. *Id.* at 117, 33 S.E.2d at 589. Two women picked up the victim and carried him to a nearby porch. *Id.* at 116, 33 S.E.2d at 588. When he regained consciousness, he discovered that his wallet was missing, and the two assailants were subsequently charged with assault and robbery. *Id.*

On appeal, this Court determined that the robbery charge could not be sustained due to insufficient evidence. *Id.* at 116, 33 S.E.2d at 589. Because there were multiple persons present and the victim was unconscious when the money was taken, we reasoned that "[u]nder such circumstances to find that any particular person took the money is to enter the realm of speculation." *Id.* at 117, 33 S.E.2d at 589. We concluded that a charge cannot be sustained "where there is merely a suspicion or conjecture" of the defendant's guilt. *Id.* at 116, 33 S.E.2d at 589.

In *State v. White*, 293 N.C. 91, 235 S.E.2d 55 (1977), the defendant was charged with second-degree murder after a woman was found stabbed to death in her mobile home outside of a motel where the defendant was staying. *Id.* at 96–97, 235 S.E.2d at 58–59. There was testimony that a motel clerk heard a woman scream and then saw a black man run out of the mobile home and head in the direction of defendant's room.

Id. at 92, 235 S.E.2d at 56. Investigators found some blood specks on the defendant's shoes and shirt but were unable to conclusively match the blood to the victim. *Id.* at 96, 235 S.E.2d at 59. The defendant admitted that he knew the victim but denied entering her mobile home that night. *Id.* at 93, 235 S.E.2d at 57.

We held that although "the evidence raises a strong suspicion as to defendant's guilt" it was "*not* sufficient to remove the case from the realm of surmise and conjecture." *Id.* at 95, 235 S.E.2d at 58. We acknowledged that the State's evidence established that the defendant was in the general vicinity of the victim's residence at the time of the murder, the defendant had given contradictory statements to law enforcement officers, and it could "even reasonably be inferred that the defendant was at the home of the deceased when the deceased came to her death, or shortly thereafter." *Id.* at 97, 235 S.E.2d at 59. Nevertheless, we were troubled by the key facts that the State had *failed* to prove, stating the following:

> (1) [The motel clerk] could not identify the man he saw leaving deceased's mobile home probably because of the distance (200-250 feet) and darkness (1 1/2 hours after sunset); (2) other black men were staying at the motel; (3) no evidence was presented that the defendant owned the murder weapon; (4) no fingerprints were found on the knife; (5) no evidence was introduced of any blood found on the defendant's pants; (6) about fifteen percent of the population has the type of blood found on the left shoe of the defendant; (7) the type of blood on the right shoe is found in thirty percent of the population; (8) the blood specks on the tee shirt, and the blood on the carpet were not identified by type or otherwise; (9) no motive was established for the crime; (10) no flight was attempted by the defendant.

Id. at 96–97, 235 S.E.2d at 59 (citation omitted).

Thus, because the State's evidence established no more than the mere opportunity for the defendant to have committed the crime, we vacated the defendant's conviction. *Id.*; *see also State v. Moore*, 312 N.C. 607, 613, 324 S.E.2d 229, 233 (1985) (reversing robbery conviction because the evidence "discloses no more than an opportunity for defendant, as well as others, to have taken the money"); *State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967) ("It is not enough to defeat the motion for nonsuit that the evidence establishes that the defendant had an opportunity to commit the crime charged.").

* * *

With these principles in mind, we must now apply them to the facts of the present case. Here, the State offered evidence that (1) defendant entered the church without permission on the night of 15 August 2012; (2) he stayed at the church for several hours; (3) he left his wallet at the front of the church near where some of the missing sound equipment was stored; and (4) he could not remember precisely what he had done inside the church that night.

To be sure, this evidence may be fairly characterized as raising a suspicion of defendant's guilt of larceny. It is clear, however, that crucial gaps existed in the State's evidence. The State failed to actually link defendant to the stolen property or to prove that he was in the church at the time when the equipment—which was never recovered—was stolen.

The evidence at trial suggested that the church doors were left unlocked after the Wednesday night service, which ended at approximately 8:00 p.m. on 15 August 2012. Defendant testified that he arrived at the church that night sometime after midnight and left the next morning around "first light." He was found by Emergency Medical Technician Calvin Cobb in a nearby field at approximately 6:30 a.m. on Thursday morning. It was not until the following Sunday morning that the absence of the equipment was noted. Thus, the State's evidence showed a four-day time span over which the theft could have occurred. It is undisputed that a number of other persons had access to the interior of the church during this four-day period.

Furthermore, the State was unable to show how defendant could have physically been able to carry away the cumbersome equipment at issue, which consisted of an audio receiver, sound system wires, four microphones, and a pair of headphones. While the State attempted to rely upon defendant's testimony that he was carrying a duffle bag earlier in the evening, the duffle bag was not located by officers. Defendant testified that he was holding a black duffle bag filled with clothes when he initially set out towards his friend's house at approximately 10:00 p.m. on Wednesday night and that he discarded the bag shortly after he began walking—realizing it would be too heavy to carry. There was no evidence suggesting that defendant had a bag of any kind with him at the time he entered or exited the church. Moreover, Cobb testified that defendant was empty-handed when Cobb encountered him early the next morning. No evidence was offered that the duffle bag was ever actually used to transport the missing items.

In sum, the State merely proved that defendant was present inside the church for several hours during the four-day period in which the equipment was taken. Under our caselaw, this is simply not enough to sustain a conviction for larceny. We therefore conclude that defendant's larceny conviction must be vacated and that we need not decide the remaining issues raised in this case.

Conclusion

For the reasons stated above, we modify and affirm the decision of the Court of Appeals vacating defendant's larceny conviction.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA
v.
KURT ALLEN COREY

No. 189PA18

Filed 6 December 2019

1. Indictment and Information—bill of indictment—identity of child victim—name required

A bill of indictment alleging that defendant committed a sex offense against "Victim #1" was fatally defective on its face for failing to state the child victim's name as required by N.C.G.S. § 15-144.2(b).

2. Sentencing—jury instruction conference—aggravating factor—position of trust or confidence

The trial court erred by failing to conduct a jury instruction conference as required by N.C.G.S. § 15A-1231(b) prior to allowing the jury to determine whether the State proved the aggravating factor that defendant took advantage of a position of trust or confidence when he committed a sex offense against a child. Any prior case law indicating that a complete failure to conduct the necessary jury instruction conference necessitates a new proceeding without a showing of material prejudice was overruled. Material prejudice was not shown here where the jury made its determination that defendant violated a position of trust or confidence after being

presented with undisputed evidence that defendant and the victim had a parent-child relationship.

Justice DAVIS did not participate in the consideration or decision of this case.

Justice NEWBY dissenting in part and concurring in the result only in part.

Justice MORGAN dissenting in part and concurring in the result in part.

On discretionary review pursuant to N.C.G.S. § 7A-31-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA17-1031, 2018 WL 2642772 (N.C. Ct. App., June 5, 2018), affirming, in part, and vacating and remanding, in part, a judgment entered on 15 December 2016 by Judge William R. Bell in the Superior Court, Burke County. Heard in the Supreme Court on 4 March 2019.

Joshua H. Stein, Attorney General, by Amy Kunstling Irene, Special Deputy Attorney General, for the State-appellant

Franklin E. Wells, Jr., for defendant-appellee.

ERVIN, Justice

The issue that the parties have presented for our consideration in this case is whether the Court of Appeals correctly held that defendant Kurt Allen Corey was entitled to a new hearing concerning the existence of a statutory aggravating factor on the grounds that the trial court failed to conduct a jury instruction conference prior to instructing the jury with respect to the manner in which it should determine whether the relevant aggravating factor did or did not exist. *See* N.C.G.S. § 15A-1340.16(d)(15) (2017). Although a careful review of the record reveals that the indictment underlying defendant's conviction for committing a sex offense with a child is fatally defective, we are still required to consider the issues that the parties have presented for our consideration given that the trial court consolidated defendant's conviction for committing a sex offense against a child for judgment with defendant's conviction for taking indecent liberties with a child. As a result of our conclusion that defendant's indictment for committing a sex offense against a child is

fatally defective and our determination that the trial court's erroneous failure to conduct a jury instruction conference prior to submission of the existence of the relevant statutory aggravating factor to the jury did not "materially prejudice" defendant, we arrest judgment with respect to defendant's conviction for committing a sex offense against a child, vacate the trial court's judgment, and remand this case to the Superior Court, Burke County, for resentencing based upon defendant's conviction for taking indecent liberties with a child.

Shannon[1] was born on 16 September 2002. Shannon's mother married defendant when Shannon was four years old. After her mother's marriage to defendant, Shannon lived with her mother, her two siblings, and defendant, who assumed the role of Shannon's father in the family household. When Shannon's mother and defendant briefly separated in 2009, Shannon and her two siblings resided with defendant until Shannon's mother returned to the family home once the separation had ended.

From 2009 through 2014, defendant forced Shannon to engage in oral sex, vaginal intercourse, and anal sex while Shannon's mother was at work. Dr. Terry Hobbs, a pediatrician who was qualified as an expert in the field of sexual assault forensics, examined Shannon. Based upon the results of this examination, Dr. Hobbs testified that Shannon's demeanor and attitude were consistent with those of a person who had suffered a traumatic event and that, in his opinion, Shannon had experienced "constipation encopresis," a condition consistent with the occurrence of sexual abuse.

On 16 August 2014, Shannon informed her grandmother that defendant had regularly engaged in sexual activity with her from the time that she was six years old until the date in question. Shortly thereafter, Shannon's grandmother told Shannon's mother about Shannon's accusations against defendant. On 18 August 2014, Shannon's mother reported the allegations that Shannon had made against defendant to a representative of the Caldwell County Sheriff's Office.

On 1 December 2014, the Burke County grand jury returned bills of indictment charging defendant with two counts of rape of a child, two counts of committing a sexual offense with a child, and two counts of taking indecent liberties with a child, with one of these rapes, sex offenses, and indecent liberties alleged to have taken place in 2009 and

1. The victim in this case will be referred to as "Shannon," which is a pseudonym used to protect the victim's identity and for ease of reading.

the other rape, sex offense, and indecent liberties alleged to have taken place in 2013. The count of the indictment returned against defendant for the purpose of charging him with committing a sex offense against a child in 2013 alleged that "on or about the date of offense shown [calendar year 2013] and in the county named above [Burke] the defendant named above [Kurt Allen Corey] unlawfully, willfully, and feloniously did engage in a sexual act with Victim #1, a child who was under the age of 13 years, namely 10 – 11 years of age," and that, "[a]t the time of the offense the defendant was at least 18 years of age." On 24 May 2016, the State notified defendant that the State intended to prove the existence of the statutory aggravating factor that "[t]he defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense" set out in N.C.G.S. § 15A-1340.16(d)(15) in the event that defendant was convicted of committing any felony offense.

The charges against defendant came on for trial before the trial court and a jury at the 12 December 2016 criminal session of the Superior Court, Burke County. On 15 December 2016, the jury returned verdicts acquitting defendant of committing a sex offense against a child in 2009, of both counts of rape, and of taking indecent liberties with a child in 2009 and convicting defendant of committing a sex offense against a child and taking indecent liberties with a child in 2013. After accepting the jury's verdict, the trial court convened a proceeding for the purpose of determining whether the aggravating factor of which the State had given defendant notice existed. Neither the State nor the defendant presented additional evidence at this sentencing-related proceeding. At the conclusion of this additional proceeding, the jury found as an aggravating factor that "defendant took advantage of a position of trust or confidence . . . to commit the offense." Based upon the jury's verdicts and its own determination with respect to the calculation of defendant's prior record level, the trial court consolidated defendant's convictions for judgment, determined that defendant should be sentenced in the aggravated range, and sentenced defendant to a term of life imprisonment without the possibility of parole. Defendant noted an appeal from the trial court's judgment to the Court of Appeals.

In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued, among other things, in reliance upon that Court's decision in *State v. Hill*, 235 N.C. App. 166, 760 S.E.2d 85 (2014), that the trial court had committed reversible error by failing to conduct a jury instruction conference prior to submitting the issue of whether the "position of trust or confidence" aggravating factor existed in this case. On 5 June 2018, the Court of Appeals filed a unanimous, unpublished

opinion holding that the trial court had committed reversible error by failing to conduct a jury instruction conference before submitting the "position of trust or confidence" aggravating factor to the jury given that defendant had not been provided with an adequate opportunity to object to the instructions that the trial court delivered to the jury concerning the manner in which it should determine whether that aggravating factor existed. *State v. Corey*, No. COA17-1031, slip op. at 2, 2018 WL 2642772, at *1 (N.C. Ct. App., June 5, 2018). In reaching this result, the Court of Appeals focused its analysis upon N.C.G.S. § 15A-1231(b), which the Court of Appeals had determined to require that

> "Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant."

Hill, 235 N.C. App. at 170, 760 S.E.2d at 88 (quoting N.C.G.S. § 15A-1231(b) (2013)). In the Court of Appeals' view, defendant was entitled to challenge the trial court's failure to comply with the requirements set out in N.C.G.S. § 15A-1231(b) (2017) on appeal even though he had failed to object to any non-compliance with the requirements of that statutory provision before the trial court, citing *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000) (stating that, "[w]hen a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial"). In addition, the Court of Appeals noted that the "material prejudice" necessary to support an award of appellate relief existed in the event that the trial court failed to conduct any charge conference addressing the manner in which the trial court should instruct the jury for the purpose of determining whether the relevant aggravating factor did or did not exist and did not afford the defendant's trial counsel an opportunity to object to the trial court's instructions relating to the relevant aggravating factor before they were delivered to the jury, citing *Hill*, 235 N.C. App. at 172-73, 760 S.E.2d at 90. After reviewing the record, the Court of Appeals determined

that the trial court had failed to hold the required jury instruction conference before submitting the "position of trust or confidence" aggravating factor to the jury and had not afforded defendant's trial counsel an adequate opportunity to object to the trial court's instructions concerning the "position of trust or confidence" aggravating factor. *Corey*, slip op. at 6, 2018 WL 2642772, at *2. As a result, the Court of Appeals vacated defendant's sentence and remanded this case to the trial court for a new proceeding to be conducted for the purpose of determining whether the "position of trust or confidence" aggravating factor existed in this case. *Id.* On 21 September 2018, this Court granted the State's request for discretionary review of the Court of Appeals' decision.

In seeking to persuade us to reverse the Court of Appeals' decision, the State argues that the Court of Appeals incorrectly held that the trial court's failure to conduct a jury instruction conference prior to submitting the "position of trust or confidence" aggravating factor to the jury constituted reversible error per se. The State posits that N.C.G.S. § 15A-1231(b) does not create a statutory mandate which can support an award of appellate relief in the absence of a contemporaneous objection at trial, citing *State v. Young*, 368 N.C. 188, 207, 775 S.E.2d 291, 304 (2015). In addition, while a defendant can seek relief on the basis of a trial court's failure to comply with a statutory mandate without having taken any action before the trial court in order to preserve the alleged error for purposes of appellate review, the existence of such a statutory mandate does not absolve the defendant from the necessity for establishing that the trial court's error was prejudicial, citing *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). As a result, even if it was error for the trial court to fail to hold a jury instruction conference prior to submitting the issue of whether the "position of trust or confidence" aggravating factor existed in this case to the jury, the State contends that the Court of Appeals was still required to find that the trial court's error resulted in "material prejudice" to defendant before overturning the trial court's judgment.

Moreover, the State argues that, in order to demonstrate "material prejudice," defendant was required to show the existence of a reasonable possibility that, had the error in question not occurred, a different result would have been reached at the sentencing proceeding, citing N.C.G.S. § 15A-1443(a) (providing that "[a] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises"). According to the

State, defendant cannot show that the trial court's erroneous failure to hold a jury instruction conference prior to submitting the issue of whether the "position of trust or confidence" aggravating factor existed to the jury "materially prejudiced" him given that the trial court correctly instructed the jury concerning the circumstances under which it should and should not find the existence of the "position of trust or confidence" aggravating factor, given that the trial court's instructions with respect to that issue tracked the language of N.C.G.S. 15A-1340.16(d)(15), and given that the record contained overwhelming evidence tending to show the existence of the "position of trust or confidence" aggravating factor in this case, citing *e.g.*, *State v. Tucker*, 357 N.C. 633, 639, 588 S.E.2d 853, 857 (2003) (stating that "[a] parent-child relationship is also indicative of a position of trust and such evidence supports the aggravating factor of abusing a position of trust"). As a result, the State urges us to reverse the Court of Appeals' decision on the grounds that any error that the trial court might have committed by failing to hold a jury instruction conference prior to submitting the issue of the existence of the "position of trust or confidence" aggravating factor to the jury did not result in "material prejudice" to defendant.

In defendant's view, on the other hand, N.C. Gen. Stat. § 15A-1231(b) establishes a statutory mandate requiring trial judges to conduct a separate jury instruction conference before instructing the jury concerning the manner in which it should determine whether a particular statutory aggravating factor does or does not exist. Defendant argues that the Court of Appeals has held that no showing of prejudice is a necessary prerequisite to an award of appeal relief when the trial judge completely fails to comply with the requirements set out in N.C.G.S. § 5A-1231(b), citing *Hill*, 235 N.C. App. at 173, 760 S.E.2d at 90. The defendant argues that, in this case, as in *Hill*, the trial court failed to conduct any jury instruction conference before submitting the issue of the existence of the "position of trust or confidence" aggravating factor to the jury, entitling defendant to relief from the jury's decision to find the existence of the relevant aggravating factor regardless of whether the trial court's error resulted in "material prejudice" to defendant.

In addition, defendant contends that, even if a showing of "material prejudice" is required, he has made such a showing in this case. According to defendant, the trial court simply read the relevant language from N.C.G.S. § 15A-1340.16(d)(15) to the jury without defining either a "position of trust" or a "domestic relationship" and failed to inform the jury that the "position of trust or confidence" aggravating factor had to arise from the relationship between Shannon and defendant and only

existed in "very limited circumstances," citing *State v. Mann*, 355 N.C. 294, 319, 560 S.E.2d 776, 791 (2002). In defendant's view, the trial court's failure to conduct a jury instruction conference prior to submitting the issue of the existence of the "position of trust or confidence" aggravating factor to the jury precluded defendant from objecting to the trial court's failure to include such information in the instructions that were provided to the jury relating to the relevant aggravating factor. As a result, defendant contends that the necessary "material prejudice" existed in this case, so that the Court of Appeals did not err by determining that he was entitled to a new hearing concerning the existence of the "position of trust or confidence" aggravating factor in this case.

[1] As an initial matter, we are obligated to determine, on our own motion, the extent to which the trial court and this Court had jurisdiction over this matter. According to N.C.G.S. § 15-144.2(b) (Supp. 2018), "[i]f the victim is a person under the age of 13 years, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, naming the child, and concluding as required by law," with "[a]ny bill of indictment containing the averments and allegations named in this section [being] good and sufficient in law as an indictment for a sex offense against a child under the age of 13 years." As we have already noted, the count of the indictment returned against defendant for the purpose of charging him with committing a sex offense against a child in 2013 alleged that defendant had committed the crime charged against "Victim # 1." Earlier this year, this Court held that the "use of the phrase 'Victim # 1' does not constitute 'naming the child' " as required by N.C.G.S. § 15-144.2(b), with the fact that the victim is named in other portions of the record, such as "the arrest warrant, original indictment, and proceedings at trial," being insufficient to excuse the State's failure to name the victim as required by N.C.G.S. § 15-144.2(b) given that the "facial validity [of an indictment] 'should be judged based solely upon the language of the criminal pleading in question without giving any consideration to the evidence that is ultimately offered in support of the accusation contained in that pleading,' " *State v White*, 372 N.C. 248, 252–54, 827 S.E.2d 80, 83–84 (2019) (quoting *State v. Ellis*, 368 N.C. 342, 347, 776 S.E.2d 675, 679 (2015); *see also State v. Benton*, 275 N.C. 378. 382, 167 S.E.2d 775, 777 (1969) (stating that " '[a] charge in a bill of indictment must be complete in itself, and contain all of the material allegations that constitute the offense charged,' " with "allegations in the warrant on which defendant was originally arrested" being insufficient "to supply a deficiency in the bill of indictment" (quoting *State v. Guffey*, 265 N.C. 331, 333, 144 S.E.2d 14, 17 (1965), and citing 42 C.J.S., *Indictments and Informations* § 108,

p. 990)); *State v. Loesch*, 237 N.C. 611, 612, 75 S.E.2d 654, 655 (1953) (stating that " '[a]n indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself' ") (quoting *State v. Jackson*, 218 N.C 373, 375, 11 S.E.2d 149, 150 (1940)). Thus, an indictment purporting to charge the defendant with committing a sex offense against "Victim # 1," without otherwise naming the victim, is "facially invalid." *White*, 372 N.C. at 254, 827 S.E.2d at 84. As a result, given that "[a] valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony," *State v. Rankin*, 371 N.C. 885, 886, 821 S.E.2d 787, 790 (2018) (quoting *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015)), and given that the Court is obligated to address jurisdictional deficiencies regardless of whether they are brought to its attention by the parties or not, *State v. Fowler*, 266 N.C. 528, 530, 146 S.E.2d 418, 420 1966) (stating that "[t]he court cannot properly give judgment unless it appears in the record that an offense is sufficiently charged" and that "[i]t is the duty of this Court to look through and scrutinize the whole record, and if it sees that the judgment should have been arrested, it will *ex mero motu* direct it to be done") (citing *State v. Strickland*, 243 N.C. 100, 103, 89 S.E.2d 781, 784 (1955);[2] *State v. Thorne*, 238 N.C. 392, 396, 78 S.E.2d 140, 142 (1953); *State v. Scott*, 237 N.C. 432, 433–34, 75 S.E. 2d 154, 155 (1953)), we are required by well-established North Carolina law to arrest judgment with respect to defendant's conviction for committing a sex offense against a child in 2013 on our own motion subject to the understanding that "[t]he State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment." *Benton*, 275 N.C. at 382, 167 S.E.2d at 778.

[2] A decision to vacate the judgment that the trial court entered in this case does not, however, eliminate the necessity for the Court to determine whether the trial court committed prejudicial error by failing to conduct a jury instruction conference prior to the submission of the "position of trust or confidence" aggravating factor to the jury given that defendant's conviction for taking indecent liberties with a child in 2013

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2. Our decision in *Fowler* refers to this case as *State v. Strickland*, which is how it is titled at the top of the relevant pages in Volume No. 243 of the North Carolina Reports. The table of contents in Volume No. 243 of the North Carolina Reports indicates that both *State v. Strickland* and *State v. Nugent* appear on the page in question. The South Eastern Reporter, however, refers to the case as *State v. Nugent*. Despite these differing names, each involves the same case, with Louis Hardy Strickland being shown as the second of the four defendants involved in the case before the trial court and with Mr. Strickland being the only defendant who sought appellate review of the trial court's judgment by this Court.

remains undisturbed. In view of the fact that the trial court consolidated defendant's convictions for committing a sex offense against a child and taking indecent liberties with a child in 2013 for judgment and the fact that the sentence embodied in the judgment that the trial court entered at the conclusion of the sentencing proceeding was based upon defendant's sex offense conviction, N.C.G.S. § 15A-1340.22(b) (2017) (providing that, in the event that the trial court elects to consolidate multiple offenses for judgment, "[a]ny sentence imposed shall be consistent with the appropriate prior conviction level of the most serious offense"), the trial court will need to resentence defendant based upon his conviction for taking indecent liberties with a child on remand. The necessity for the trial court to make this resentencing decision, in turn, requires us to ascertain whether there is any legal defect in the jury's determination that the "position of trust or confidence" aggravating factor exists in this case.

According to N.C.G.S. § 15A-1231(b) (2017), prior to "the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury," at which "the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given." However, N.C.G.S. § 15A-1231(b) also provides that "[t]he failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant." As the Court of Appeals noted in *Hill*, 235 N.C. App. at 171, 760 S.E.2d at 89, the use of mandatory statutory language such as that found in N.C.G.S. § 15A-1231(b) and the importance of the purposes sought to be served by the holding of a jury instruction conference indicates that "holding a charge conference is mandatory" and that "a trial court's failure to do so is reviewable on appeal even in the absence of an objection at trial." In view of the fact that the record clearly establishes that the trial court did not conduct a jury instruction conference or otherwise discuss the manner in which the jury should be instructed concerning the issue of the existence of the "position of trust or confidence" aggravating factor with counsel for the parties before submitting that issue to the jury, we hold, despite defendant's failure to lodge a contemporaneous objection to trial court's non-compliance with N.C.G.S. § 15A-1231(b), that the trial court erred by failing to conduct a jury instruction conference concerning the manner in which the jury should determine the existence or nonexistence of the "position of trust

or confidence" aggravating factor before allowing the jury to determine whether that aggravating factor did or did not exist.[3]

The Court of Appeals appears to have concluded in *Hill* that the showing of "material prejudice" ordinarily required as a prerequisite for an award of appellate relief arising from a trial court's failure to comply with N.C.G.S. § 15A-1231(b) need not be made in the event that the trial court fails to hold any sort of jury instruction conference at all, citing *Hill*, 235 N.C. App. at 172–73, 760 S.E.2d at 90 (citing *State v. Clark*, 71 N.C. App. 55, 57–58, 322 S.E.2d 176, 177 (1984), *disapproved on other grounds in State v. Moore*, 327 N.C. 378, 395 S.E.2d 124 (1990)), with this implicit distinction between cases in which the trial judge entirely fails to comply with N.C.G.S. § 15A-1231(b) and cases in which the trial court partially complies with N.C.G.S. § 15A-1231(b) appearing to rest upon the use of "fully" in the relevant statutory language. When read literally and in context, however, the reference in N.C.G.S. § 15A-1231(b) to the necessity for the trial court to "comply fully" with the statutory requirement that a jury instruction conference be conducted, instead of distinguishing between a complete and a partial failure to comply with the applicable statutory requirement, is intended to require the making of a showing of "material prejudice" a prerequisite to an award of appellate relief regardless of the nature and extent of the trial court's non-compliance with N.C.G.S. § 15A-1231(b). As a result, to the extent that the Court of Appeals decided in this case that, under *Hill* and *Clark*, a total failure to conduct a jury instruction conference necessitates the holding of a new proceeding for the purpose of determining that a particular aggravating factor exists regardless of whether the defendant did or did not make a showing of "material prejudice," that decision was erroneous and any earlier decisions to the contrary are overruled.

As we have already noted, N.C.G.S. § 15A-1443(a) (2018) provides that a non-constitutional error is prejudicial in the event that the defendant shows that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been

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3. We do not believe that the fact that N.C.G.S. § 15A-1231(b) requires the trial court to "inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will instruct the jury" supports an inference that no jury instruction conference is necessary outside the context of the guilt-innocence portion of a criminal trial. On the contrary, we are persuaded by the Court of Appeals' reasoning in *Hill*, 235 N.C. at 172, 760 S.E.2d at 89, that the absence of any "specifics of how the trial court should conduct a separate sentencing proceeding" and the absence of any statutory language suggesting the existence of a legislative "intent to mandate a different procedure than that which governs trials of criminal offenses" in sentencing-related proceedings shows that N.C.G.S. § 15A-1231(b) "applies to sentencing proceedings" conducted pursuant to N.C.G.S. § 15A-1340.16(a1).

reached at the trial out of which the appeal arises." Although the Court of Appeals held that the trial court's error materially prejudiced defendant because the trial court failed to give defendant "the opportunity to object to the instruction on the aggravating factor" and although defendant argues that the trial court's error materially prejudiced him because "[t]he instruction given did not advise the jury that [the 'position of trust and confidence' aggravating] factor arises only from the relationship between the defendant and the victim and applies in 'very limited circumstances,' " [4] we do not find these arguments persuasive. As a practical matter, the logic underlying the Court of Appeals' prejudice determination is tantamount to an assertion that mere non-compliance with N.C.G.S. § 15A-1231(b), standing alone, automatically requires an award of appellate relief. For the reasons set forth above, an automatic reversal rule cannot be squared with the language of N.C.G.S. § 15A-1231(b). In addition, given that the undisputed, overwhelming evidence contained in the present record tends to show that the victim in this case was defendant's step-child, with the victim having been dependent upon the defendant in various ways; given that defendant has not pointed to anything in the present record that in any way suggests that there is any likelihood that the jury would have relied upon any relationship other than the one between the victim and defendant in the course of finding the existence of the relevant aggravating factor; and given the strength of the evidence tending to show the existence of the "position of trust or confidence" aggravating factor in this case, we are unable to conclude that any of the arguments that defendant has advanced in an attempt to show "material prejudice" have any merit either.[5] Simply put, as this Court has previously noted, "[a] parent-child relationship" of the

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4. In addition to the arguments discussed in the text of this opinion, defendant also contends that the trial court failed to "advise the jury what it must do if one or more jurors did have a reasonable doubt" about the existence of the relevant aggravating circumstance and that "[t]he verdict form . . . contains no instructions about what to do if the answer was '[n]o.' " However, the trial court clearly instructed the jury that, it if failed to find the existence of the "position of trust or confidence" aggravating factor, it should "leave the blank—the space blank with regard to the aggravating factor."

5. Although defendant asserted that the trial court should have included the additional information set out in the text in its sentencing proceeding instructions in his brief before the Court of Appeals, the relevant statements were made in the context of a discussion of the prejudice that resulted from the trial court's failure to conduct a jury instruction conference rather than in the context of an independent challenge to the lawfulness of the trial court's instructions to the jury concerning the existence or non-existence of the aggravating factor delineated in N.C.G.S. § 15A-1340.16(d)(15). As a result, there is no need for this Court to remand this case to the Court of Appeals for consideration of any challenge to the validity of the trial court's instructions to the jury concerning the "position of trust or confidence" aggravating factor.

type revealed by the undisputed evidence in this case "is . . . indicative of a position of trust," with evidence establishing the existence of such a relationship tending to "support[ ] the aggravating factor of abusing a position of trust." *Tucker*, 357 N.C. at 639, 588 S.E.2d at 857 (2003). Thus, for all of these reasons, we conclude that the trial court's failure to comply with N.C.G.S. § 15A-1231(b) did not "materially prejudice" defendant, so that defendant is not entitled to any relief from the jury's decision to find the existence of the "position of trust or confidence" aggravating factor in this case.

Thus, for the reasons set forth above, we hold that the indictment underlying defendant's conviction for committing a sex offense with a child in 2013 is fatally defective and that the trial court's judgment with respect to the conviction must be vacated. In addition, we hold that the Court of Appeals erred by determining that the trial court's erroneous failure to conduct a jury instruction conference prior to submitting the issue of whether "defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense" "materially prejudiced" defendant. As a result, the judgment entered by the trial court based upon defendant's consolidated convictions is vacated, judgment is arrested in connection with defendant's conviction for committing a sex offense against a child in 2013, the Court of Appeal's decision that the trial court's failure to hold a jury instruction conference before submitting the "position of trust or confidence" aggravating factor to the jury constituted prejudicial error is reversed, and this case is remanded to the Superior Court, Burke County, for resentencing based upon defendant's conviction for taking indecent liberties with a child, subject to the understanding that the State remains free to recharge defendant with committing a sex offense with a child in 2013 on the basis of a valid indictment.

VACATED IN PART, REVERSED IN PART.

Justice DAVIS did not participate in the consideration or decision of this case.

Justice NEWBY dissenting in part and concurring in result only in part.

For the reasons stated in my dissenting opinion in *State v. White*, 827 S.E.2d 80 (N.C. 2019), I dissent from the portion of the majority opinion that holds the indictment technically flawed. Defendant was fully

aware of the identity of the victim, his wife's daughter, and the charges against him. As I stated in *White*, "Once again, a child victim must endure the emotional distress and indignities of another trial because of a purely legal technicality. It is this type of legal gamesmanship which leads to cynicism about whether justice prevails in our criminal justice system." *Id.* at 85.

I concur in result only in part because the statutory language relevant here does not specifically require a formal charge conference during the sentencing phase; thus, the absence of a separate charge conference during the sentencing phase was not error.

Section 15A-1231 governs jury instructions at trial and provides:

> (b) Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.

N.C.G.S. § 15A-1231(b) (2017). The text of section 15A-1231 does not mention the sentencing phase of trial or aggravating factors.

Section 15A-1340.16 governs the procedures for determining the existence of aggravating factors during a noncapital sentencing. If the defendant does not admit the existence of an aggravating factor, the State must prove its existence to the jury beyond a reasonable doubt. N.C.G.S. § 15A-1340.16(a), (a)(1) (2017). Section 15A-1340.16(a1) allows the jury to determine if one or more aggravating factors exists in the same trial or at the sentencing phase. N.C.G.S. § 15A-1340.16(a1).

> If the court determines that a separate [sentencing] proceeding is required, the proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. . . . A jury selected to determine whether one or more aggravating factors exist

> shall be selected in the same manner as juries are selected for the trial of criminal cases.

Id. Neither the plain language of section 15A-1231(b) nor the plain language of section 15A-1340.16 requires a trial judge to hold another formal charge conference before instructing the jury at a sentencing proceeding to determine the existence of an aggravating factor. It merely requires that the charge conference occur "[b]efore the arguments to the jury" and "out of the presence of the jury." N.C.G.S. § 15A-1231(b).

Here the same jury that convicted defendant during the guilt-innocence phase found the relevant aggravating factor during the sentencing phase. By holding the charge conference during the guilt-innocence phase, the trial court complied with the statutory requirements that the charge conference occur "[b]efore the arguments to the jury" and "out of the presence of the jury." Further, defendant had been properly notified that the State intended to present an aggravating factor to the jury; he knew the trial court would instruct the jury on the factor. The trial court gave defendant and the State an opportunity to be heard before and after the trial court instructed the jury on the aggravating factor. Defendant did not object. Reading the statute to require an additional charge conference adds to the statutory text. Accordingly, I respectfully dissent in part and concur in result only in part.

Justice MORGAN dissenting, in part, and concurring in the result, in part.

While I agree with my colleagues in the majority that N.C.G.S. § 15-144.2(b) (2017) expressly requires that a short-form indictment for statutory sex offense name the alleged child victim, I must disagree with them that the indictment upon which defendant was found guilty for committing a sex offense against a child in 2013 failed to comport with the statute's requirements. I would find that the indictment at issue is facially valid and, therefore, sufficient to confer jurisdiction upon our courts to adjudicate the case, because the indictment fulfills all of the legal requirements which are required for the validity of the charging instrument. The indictment that this Court determined to be fatally defective in *State v. White*, 372 N.C. 248, 256, 827 S.E.2d 80, 86 (2019), is virtually indistinguishable from the count of the indictment in the present case from which the conviction arose which the majority has vacated, while expressly informing the State that defendant may be recharged with the crime of committing a sex offense against a child. I would embrace and apply the fundamental reasoning of my dissenting

opinion in *White*, thereby affirming defendant's conviction of committing a sex offense against a child. My resolution of the jury charge conference issue which this case presents is consistent with the learned majority; however, I find it needless to overrule the Court of Appeals precedent of *State v. Hill*, 235 N.C. App. 166, 760 S.E.2d 85 (2014), *disc. rev. denied*, 367 N.C. 793, 766 S.E.2d 637 (2014) and its significant progeny to reach the same legal conclusion determined by the majority, and would likewise reverse the lower appellate court as to this sentencing matter and remand the case to the superior court for resentencing as dictated.

Section 15-144.2(b) of the North Carolina General Statutes, in delineating the essentials of a short-form indictment for a sex offense, states in pertinent part:

> (b) If the victim is a person under the age of 13 years, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, naming the child, and concluding as aforesaid [in subsection (a)].

N.C.G.S. § 15-144.2(b) (Supp. 2018). "Any bill of indictment containing the averments and allegations named in this section is good and sufficient in law as an indictment for sex offense against a child under the age of 13 years and all lesser included offenses." N.C.G.S. § 15-144.2(b) (Supp. 2018). Pursuant to N.C.G.S. § 14-27.4A(a) (now recodified as N.C.G.S. § 14-27.28 (2017)), "[a] person is guilty of statutory sexual offense with a child by an adult if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." N.C.G.S. § 14-27.28 (2017).

The majority conveniently disregards the extensive statutory, constitutional, and conceptual developments which allow a measure of practical deviation from the rigid and staid technical requirements imposed on criminal indictments at common law in concluding here that the indictment upon which defendant was found guilty for committing a sex offense against a child was fatally defective. Its taut and unpliant embrace of such archaic principles are demonstrated by the majority's heavy reliance on *State v. Jackson*, 218 N.C. 373, 11 S.E.2d 149 (1940) and its progeny of cases which were decided by this Court some decades ago. However, more recently this Court has recognized that "we are no longer bound by the 'ancient strict pleading requirements of the common law.' " *State v. Williams*, 368 N.C. 620, 623, 781 S.E.2d 268, 271 (2016) (quoting *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743,

746 (1985)). "Instead, contemporary criminal pleadings requirements have been 'designed to remove from our law unnecessary technicalities which tend to obstruct justice.' " *Id.* The General Assembly has provided that "[e]very criminal proceeding by indictment is sufficient in form for all intents and purposes if it expresses the charge against the defendant in a plain, intelligible, and explicit manner, and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment." N.C.G.S. § 15-153 (2017), *quoted in Williams*, 368 N.C. at 623, 781 S.E.2d at 271 (2016) (emphasis added). Our courts have joined the General Assembly in its efforts to simplify the standard for indictments. *See e.g.*, *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953). Because "the quashing of indictments is not favored," *State v. James*, 321 N.C. 676, 681, 365 S.E.2d 579, 582 (1988), an indictment is facially valid if it uses "either literally or substantially the language found in the statute defining the offense." *Williams*, 368 N.C. at 626, 781 S.E.2d at 272. Indeed, this Court has determined that "[a]n indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense." *State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984).

In the case at bar, the count of the indictment returned against defendant for the purpose of charging him with committing a sex offense against a child alleged that, "on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully, and feloniously did engage in a sexual act with Victim #1, a child who was under the age of 13 years, namely 10 – 11 years of age. At the time of the offense the defendant was at least 18 years of age. This act was in violation of the above-referenced law." In finding that defendant's indictment for sex offense was facially invalid, the majority expressly relies upon its holding in *White* that the "use of the phrase 'Victim #1' does not constitute 'naming the child' " as required by N.C.G.S. § 15-144.2(b). *See White*, 372 N.C. at 248, 827 S.E.2d at 80. However, whether or not the State's use of "Victim #1" was sufficient for purposes of "naming the victim," although relevant, is not as automatically dispositive of the facial validity of the indictment at issue as the majority unfortunately believes. Rather, as earlier noted and as evidenced in our previous holdings, the validity of the indictment depends upon whether defendant was sufficiently apprised of the charge against him. "It is the duty of this Court to look through and scrutinize *the whole record*" in assessing whether "an

offense is sufficiently charged." *State v. Fowler*, 266 N.C. 528, 530, 146 S.E.2d 418, 420 (1966).

Here, although the State employed an effort to protect the alleged victim's identity by identifying her as "Victim #1" in defendant's indictment for the sex offense at issue, a review of the whole record reveals that defendant was sufficiently apprised of the charges against him. The indictment substantially tracks the critical language of N.C.G.S. § 14-27.4A, the statute under which defendant was charged. The initials of the alleged victim—which our appellate courts and federal courts have deemed sufficient for an indictment to be facially valid—appeared in the arrest warrant that was issued for defendant and which served as a preface for defendant's subsequent indictment for sex offense, as well as in the indictment charging defendant with taking indecent liberties with a child in 2013. *See e.g.*, *State v. McKoy* 196 N.C. App. 650, 657–58, 675 S.E.2d 406, 412, *appeal dismissed and disc. rev. denied*, 363 N.C. 586, 683 S.E.2d 215 (2009) (holding that "[t]he record on appeal demonstrates that [d]efendant had notice of the identity of the victim . . . [because] [t]he arrest warrants served on [d]efendant listed the victim by her initials."); *see also United States v. Wabo*, 290 F. Supp. 2d 486, 490 (D.N.J. 2003) (concluding that "the Superseding Indictment contains sufficient factual and legal information for the defense to prepare its case. Although the victims are identified by initials, it is not essential that an indictment identify victims by their given names."). The notice to defendant of the identity of "Victim #1" was so clear and effective that neither he nor his trial counsel raised an issue of any insufficiency or vagueness in the indictment as to the alleged child victim's identity. And while my distinguished colleagues of the majority are correct that this Court may act *ex mero motu* on a matter involving the properness of jurisdiction, it is inescapable to recognize that defendant considered himself to be so apprised of the elements of his alleged crime of committing a sex offense against a child that the issue was not even broached for review by this Court or by the Court of Appeals.

I would find that the effectiveness and sufficiency of the notice given to defendant as to the identity of "Victim #1" in the indictment for sex offense of a minor child, based upon the alleged victim's identity being sufficiently divulged in the documents which are contained in the present record, is readily apparent from the procedural and substantive circumstances at the trial level, and buttressed by the lack of the issue being presented for resolution at the appellate level. With the majority's citation of language excerpted from *White* that the "facial validity [of an indictment] 'should be judged based solely upon the language

of the criminal pleading in question without giving any consideration to the *evidence* that is ultimately offered in support of the accusation contained in that pleading,' " 372 N.C. at 254, 827 S.E.2d at 84, the majority erects the proverbial straw man that it easily blows down by conflating the State's *legally sufficient proof* that defendant's stepchild was the indictment's "Victim #1" with the State's *legally sufficient notice* that defendant's stepchild was the indictment's "Victim #1." However, defendant did indeed know the identity of the indictment's "Victim #1" before any evidence was presented at trial, due to the legal sufficiency of the charging instrument and supportive documentation in the record, and illustrated by defendant's familiarity with the State's contentions.

In my view, the majority does not sufficiently justify its determination that the indictment charging defendant with committing a sex offense against a child is facially invalid as to the identification of the alleged child victim as "Victim #1" in light of the achievement of required notice to defendant which protected all of his constitutional rights, while simultaneously satisfying the legal requirements for a valid short-form indictment and salvaging some protection of privacy for the minor child. I would therefore hold that the indictment was facially valid and sufficient to confer jurisdiction upon our courts to adjudicate the case, thus affirming defendant's conviction.

I now turn to the issues that the parties have presented for our consideration. North Carolina General Statutes Section 15A-1231 addresses the subject of jury instructions in criminal jury trials. Subsection (b) of the statute reads as follows:

> Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. *The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of trial, materially prejudiced the case of the defendant.*

N.C.G.S. § 15A-1231(b) (2017) (emphasis added). Section 15A-1340.16(a) of the General Statutes provides a general foundation for the concept of

aggravated and mitigated sentences in criminal matters, stating in pertinent part that "[t]he court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate," with "[t]he State bear[ing] the burden of proving beyond a reasonable doubt that an aggravating factor exists." N.C.G.S. § 15A-1340.16(a) (2017). If the defendant does not admit to the existence of an aggravating factor, then only a jury may determine if an aggravating factor is present in an offense. N.C.G.S. § 15A-1340.16(a1). If the jury finds that any aggravating factors exist, then the court may depart from the presumptive range of sentences if the court determines that they outweigh any mitigating factors that are present, and upon such a departure may impose a sentence that is permitted by the aggravated range. N.C.G.S. § 15A-1340.16(b) (2017). A circumstance in the perpetration of a criminal offense that the defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense is statutorily established as an aggravating factor. N.C.G.S. § 15A-1340.16(d) (15) (2017).

I agree with the majority that, regardless of the nature and extent of the trial court's non-compliance with the requirements of N.C.G.S. § 15A-1231(b), defendant is required to show that he was materially prejudiced by such non-compliance in order to be afforded relief on appeal and that defendant failed to demonstrate such prejudice here. However, because the Court of Appeals firmly premised its decision on its precedent embodied in *State v Hill*, 235 N.C. App. 166, 760 S.E.2d 85 (2014) in determining that defendant was materially prejudiced because his trial counsel was not given an opportunity to object to the instructions regarding the aggravating factor before they were given to the jury, I depart from the majority regarding the manner in which I reach the same conclusion that in the present case, defendant was not materially prejudiced by the trial court's failure to conduct a jury charge conference on the submitted aggravating factor. In doing so, my alternative determination would simultaneously distinguish the instant case from *Hill* on their respective procedural facts, thereby preventing the need to overrule *Hill* and its progeny as the majority has seen fit to do.

The Court of Appeals, in deciding *Hill*, deemed it important to accentuate that "in addition to not holding a charge conference, the trial court, contrary to the General Rules of Practice, did not, following his charge to the jury, give counsel an opportunity to object to the charge . . . As a result, defense counsel was unable to have any input into the jury instructions at all." *Hill*, 235 N.C. App. at 173, 760 S.E.2d at 90. The lower appellate court included this circumstance in its ultimate conclusion in

Hill that defendant experienced material prejudice. On the other hand, however, the trial court in the case at bar provided both defendant and the State with the opportunity to be heard both before *and* after the trial court's instructions to the jury on the aggravating factor. The trial transcript in the present case contains the following exchange among the trial court, the State's prosecutor Mr. Swanson, and defendant's counsel Mr. Bostian, immediately after the jury returned its verdicts of guilty and at the outset of the sentencing phase of the case:

> THE COURT: Okay. Ladies and gentlemen, now that you have returned a verdict - - and I didn't know this until you - - what - - I had a sense of what your verdicts were or know what your verdicts were - - the State in this matter has also filed what is called an "aggravating factor."
>
> An aggravating factor is something that the jury has to determine whether it exists or not. And if, in fact, the jury finds that it does exist, it is something the Court could consider in imposing the sentence in this case. I don't know whether - -
>
> Are you ready to proceed with that at this point?
>
> MR. SWANSON: Yes, Your Honor, I think they have - - I am ready to proceed.
>
> THE COURT: *Are you ready to proceed?*
>
> MR. BOSTIAN: *Yes*, *Your Honor*.

(emphasis added). Both the State and defendant declined the opportunity to offer further evidence on the aggravating factor before giving brief statements to the jury. After instructing the jury, the trial court excused the jury from the courtroom to deliberate the issue of the existence of the aggravating factor, and the transcript of the proceedings displays the trial court's invitation to counsel for both sides:

> THE COURT: All right, outside the presence of the jury, Defendant is present in open court with his attorney, Mr. Swanson's here on behalf of the State, the jury having returned those guilty verdicts on two of the six charges, and the State previously having asked the Court to make a determination with respect to the out-of-state Michigan conviction; *is there anything else you want to be heard* - - or do you wish to be heard any further on that?

(emphasis added). Neither defendant nor the State chose to say anything through their respective counsel about the trial court's instruction to the jury on the aggravating factor.

Consistent with the Court of Appeals' emphasis in *Hill* regarding the importance of defense counsel's opportunity at a trial's sentencing phase to be heard following the trial court's jury charge instruction on an aggravating factor in order to prevent a trial court's failure to comply fully with the provisions of N.C.G.S. § 15A-1231(b) from reaching a level of material prejudice to a defendant's case, and our recognition of this essential common trait which *Hill* shares with the instant case, this Court has likewise determined the cases of *State v. Bennett*, 308 N.C. 530, 302 S.E.2d 786 (1983) and *State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002).

In *Bennett*, we considered the provisions of N.C.G.S. § 15A-1231(b), in conjunction with other statutes and pertinent rules, in assessing the defendant's argument that he was not given the opportunity by the trial court to object to instructions outside the presence of the jury. After charging the jury with its instructions, the trial court asked if there was "anything further from either the State or the defendant"; the defendant's response was, "Nothing for the defendant." *Bennett*, 308 N.C. at 535, 302 S.E.2d at 789-90. We observed:

> At this time the defendant could have objected to the instructions out of the hearing of the jury or requested that he be permitted to make his objections out of the presence of the jury. The record reveals that the defendant did neither. His failure to object to the instructions cannot, on the record before us, be said to have been caused by the lack of opportunity for the defendant to make his objections out of the hearing of the jury.

Id. *Wiley* presented another opportunity for this Court to examine the operation of N.C.G.S. § 15A-1231(b) where the issue of material prejudice was raised with regard to a jury charge conference and counsel's ability to be heard concerning a trial court's instructions. We cited our holding in *State v. Wise*, 326 N.C. 421, 390 S.E.2d 142, *cert. denied*, 498 U.S. 853, 111 S. Ct. 146, 112 L. Ed. 2d 113 (1990) as controlling the outcome in *Wiley* in determining that, where both sides indicated that they were satisfied with the jury charge, defendant cannot show material prejudice from a trial court's failure to comply fully with provisions of N.C.G.S. § 15A-1231(b) if the defendant had the opportunity to object to the charge but declined to do so. *Wiley*, 355 N.C. at 630, 565 S.E.2d at 49 (2002).

The important aspect of defense counsel's opportunity at a trial's sentencing phase to be heard following the trial court's charge to the jury is a critical trial level juncture which was not afforded to the defendant in *Hill* but was undoubtedly offered to defendant in the current matter. This distinguishing feature provides a sufficient rationale upon which to find that defendant's case was not materially prejudiced under N.C.G.S. § 15A-1231, that the statute's interpretation afforded by *Hill* from the Court of Appeals and *Hill's* predecessors of *Wiley* and *Wise* from this Court in construing the content and applicability of N.C.G.S. § 15A-1231(b) is sound, and that *Hill* and its progeny—coupled with their foundation which is consistent with this Court's precedent regarding similar issues under N.C.G.S. § 15A-1231(b)—are procedurally distinguishable in evaluating trial proceeding occurrences such that it is needless to overrule *Hill* and its guiding principles.

Based on the foregoing observations, I would reverse the Court of Appeals on all issues, while accordingly reinstating defendant's conviction for the offense of committing a sex offense against a child and the trial court's resulting judgment.

IN RE A.D.

[373 N.C. 248 (2019)]

IN THE MATTER OF A.D.	)	From Cabarrus County

No. 418A19

ORDER

Appellant-respondent's Motion to Withdraw Appeal is allowed. Because no costs have been or will be assessed by the Court in this pending appeal, appellant-respondent's request for the waiver of costs is dismissed as moot.

By Order of the Court in Conference, this 3rd day of December, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of December, 2019.

AMY FUNDERBURK

Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. ANTHONY

[373 N.C. 249 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Rowan County
	)	
KENNETH RUSSELL ANTHONY	)	

No. 352P19

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady*, 831 S.E.2d 542 (N.C. 2019) (179A14-3), including what, if any, additional proceedings should be utilized in order to properly decide the questions that will be before it on remand. The temporary stay issued in this case on 5 September 2019 is hereby dissolved and the State's petition for writ of supersedeas is denied.

By Order of the Court in Conference, this 4th day of December, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of December, 2019.

AMY FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Forsyth County
	)	
RUDOLPH COLES, JR.	)	

No. 417PA18

ORDER

Defendant's motion for appropriate relief is decided as follows: Pursuant to N.C.G.S. § 15A-1415(b), the Court determines that it is necessary to remand this case to the Superior Court, Forsyth County for the holding of a hearing, the taking of evidence, and the entry of an order addressing defendant's motion for appropriate relief. The proceedings associated with defendant's appeal are stayed pending the completion of the required trial court proceedings in accordance with N.C.G.S. § 15A-1418(c). The Superior Court, Forsyth County shall, upon the entry of its order, transmit that order to this Court as required by N.C.G.S. § 15A-1418(a) so that it may either proceed with the appeal or enter an appropriate order terminating it.

By order of the Court in conference, this the 4th day of December, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of December, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

STATE v. TUCKER

[373 N.C. 251 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Rowan County
	)	
JESSE JAMES TUCKER	)	

No. 330A19

ORDER

The parties' motions presently before us are decided as follows: This case is remanded to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady*, 831 S.E.2d 542 (N.C. 2019) (179A14-3). The temporary stay issued in this case on 22 August 2019 and the writ of supersedeas issued on 9 September 2019 are hereby dissolved. Defendant's remaining motions are dismissed as moot.

By Order of the Court in Conference, this 4th day of December, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of December, 2019.

AMY FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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25P19	John Keely Howard and wife, Cynthia Hicklin Hammond v. OrthoCarolina, P.A.; Alfred L. Rhyne, III, M.D.; Faisal A. Siddiqui, M.D.; Theodore A. Belanger, M.D.	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-71)	Denied
31PA19	Eve Gyger v. Quinten Clement	Motion to Withdraw as Counsel for Defendant-Appellee (COA18-244)	Allowed **11/25/2019**
54P19-2	State v. Rogelio Albino Diaz Tomas	1. Def's Petition for Writ of Mandamus (COAP19-490; COA19-777) 2. Def's Petition for Writ of Certiorari to Review Order of the COA 3. Def's Motion to Deem Petition Timely Filed	1. Denied **11/08/2019** 2. Denied **11/08/2019** 3. Dismissed as moot **11/08/2019**
115A04-3	State v. Scott David Allen	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Montgomery County 2. Def's Petition in the Alternative for Writ of Mandamus 3. State's Motion for Extension of Time to File Response to Petition for Writ of Certiorari and Writ of Mandamus 4. Def's Motion for Extension of Time to File Brief 5. Def's Motion to Allow Withdrawal of Margaret C. Lumsden as Counsel 6. Def's Motion for Office of Indigent Defense Services to Appoint New Co-Counsel 7. Def's Motion for Extension of Time to File Brief	1. Allowed **09/25/2019** 2. 3. Allowed **05/21/2019** 4. Allowed **10/07/2019** 5. Allowed **10/09/2019** 6. Allowed **10/09/2019** 7. Allowed **11/07/2019**
119A19	Lisa Dawn Crews v. James Scott Crews	1. Def's Notice of Appeal Based Upon a Dissent (COA18-42) 2. Def's Motion to Dismiss Appeal	1. --- 2. Allowed **11/19/2019**
142A97-3	State v. Terrance Dion Bowman	1. Def's Pro Se Motion for Relief 2. Def's Pro Se Motion for Appropriate Relief	1. Dismissed 2. Dismissed

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148P19	Patricia Hager, Executrix of the Estate of Albert Hoffmaster v. Smithfield East Health Holdings, LLC d/b/a Gabriel Manor Assisted Living Center, Smithfield Operations, LLC, Saber Healthcare Holdings, LLC, Saber Healthcare Group, LLC, Sherry Tabor	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-651) 2. Def's Motion for Withdrawal and Substitution of Counsel	1. Denied 2. Allowed **Davis, J., recused**
153A19	N.C. Department of Revenue v. Graybar Electric Company, Inc.	Petitioner's Motion to Amend Appendix to Brief	Allowed **11/26/2019**
159A19	In the Matter of C.J.	Respondent-Mother's Motion for Leave to File Supplemental Brief	Allowed
172A19	In the Matter of J.H., Z.R., A.R., and D.R.	1. Respondent's Motion to Amend the Record on Appeal 2. Petitioner's Motion to Consider the Brief of the Forsyth County Department of Social Services Timely Filed	1. Allowed **07/08/2019** 2. Allowed **11/14/2019**
211PA16	SED Holdings, LLC v. 3 Star Properties, LLC, James Johnson, TMPS LLC, Mark Hyland, and Home Servicing, LLC	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA15-747) 2. Defs' Motion to Appear 3. Plt's Motion to Stay Proceedings Against 3 Star Properties, LLC because it is in Bankruptcy 4. Plt's Motion that Plaintiff be Permitted to Proceed Now in the Trial Court Against the Remaining Defendants 5. Plt's Motion to Lift Stay Order 6. Defs' Motion to Allow Time to Respond to Motion of Plaintiff to Dissolve the PDR Allowed by this Court 7. Defs' Motion to Dismiss Appeal	1. Allowed **09/22/2016** 2. Allowed **11/01/2016** 3. Special Order **11/01/2016** 4. Special Order **11/01/2016** 5. Dismissed as moot 6. Allowed **02/02/2017** 7. Allowed **Davis, J., recused**
212A19	In the Matter of E.B.M., Z.A.M.	Respondent-Mother's Motion to Withdraw and to Allow the Executive Director to Re-Appoint Counsel	Allowed **11/06/2019**

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218P17-2	NNN Durham Office Portfolio 1, LLC, et al. v. Grubb & Ellis Company, et al.	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA17-607) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal 4. Defs' Conditional PDR Under N.C.G.S. § 7A-31 5. Plts' Motion to Withdraw PDR as to Appellants NNN Durham Office Portfolio 12, LLC and St. Kitts Investments, LLC	1. --- 2. Denied 3. Allowed 4. Dismissed as moot 5. Allowed
220A19	In the Matter of J.M., J.M., J.M., J.M., J.M.	Respondent-Mother's Motion to Amend Record on Appeal	Allowed **12/03/2019**
228P19	State v. Timothy Calvin Denton	1. State's Motion for Temporary Stay (COA18-742) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/14/2019** Dissolved **12/04/2019** 2. Denied 3. Denied
250P19	Todd Preston Jackson v. The Timken Company, Deborah K. Gentry, RN, a/k/a Deborah Gentry Weatherman	Def's PDR Under N.C.G.S. § 7A-31 (COA18-695)	Denied
252PA14-3	State v. Thomas Craig Campbell	Def's Motion for Judicial Notice (COA13-1404, 13-1404-2, 13-1404-3)	Dismissed as moot
256P16-3	State v. Jonathan James Newell	1. Def's Pro Se Petition for Writ of Habeas Corpus (COAP16-233) 2. Def's Pro Se Motion to Appoint Counsel	1. Denied **11/20/2019** 2. Dismissed as moot **11/20/2019**
257P19	State v. Charles Fitzgerald Harris	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA18-910) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
263PA18	State v. Cedric Theodis Hobbs, Jr.	Def's Second Motion to Supplement Record on Appeal	Allowed
263PA18	State v. Cedric Theodis Hobbs, Jr.	Def's Motion to File Amended Reply Brief	Allowed

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276A19	In the Matter of B.L.H.	Respondent-Father's Motion to Withdraw and Allow Parent Defender to Re-Appoint Counsel	Allowed **11/06/2019**
277P18-6	State v. Gabriel Adrian Ferrari	Def's Pro Se Motion to Strike the Order of the Court in Conference 25th of September 2019 (COA98-724)	Dismissed
290PA15-2	State v. Jeffrey Tryon Collington	Def's Motion for Production of a Recording (COA14-1244)	Dismissed as moot **11/07/2019**
303A19	In the Matter of N.G.	Petitioner's Motion for Extension of Time to File Appellee Brief and Response to Petition for Writ of Certiorari	Allowed **11/07/2019**
304P18-2	State v. Maurice McKinnon	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, New Hanover County (COAP18-494) 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
311A19	State v. Ricky Franklin Charles	1. Def's Notice of Appeal Based Upon a Dissent (COA18-945) 2. Def's PDR as to Additional Issues 3. Def's Motion to Amend the Record on Appeal 4. Def's Motion to Amend Certificates of Filing and Service 5. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Dismissed as moot 4. Allowed 5. Denied
323P19	Lisa Rhodes v. Justin Robertson	1. Plt's Pro Se Notice of Appeal Based Upon A Constitutional Question (COA18-1253) 2. Plt's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied

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330A19	State v. Jesse James Tucker	1. State's Motion for Temporary Stay (COA18-1295)	1. Allowed **08/22/2019** Special Order
		2. State's Petition for Writ of Supersedeas	2. Allowed **09/09/2019** Special Order
		3. State's Notice of Appeal Based Upon a Dissent	3. ---
		4. Def's Motion to Dismiss Appeal	4. Special Order
		5. Def's Motion to Dissolve Temporary Stay	5. Special Order
		6. Def's Motion to Stay Briefing Schedule Until Resolution of the Motion to Dismiss	6. Special Order
332P19	State v. Dalton Dewayne Flowers	1. Def's Motion for Temporary Stay (COA18-832)	1. Allowed **08/23/2019** Dissolved **12/04/2019**
		2. Def's Petition for Writ of Supersedeas	2. Denied
		3. Def's Notice of Appeal Based Upon a Constitutional Question	3. ---
		4. Def's PDR Under N.C.G.S. § 7A-31	4. Denied
		5. State's Motion to Dismiss Appeal	5. Allowed
347P19	State v. James Edward Raynor, Jr.	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-942)	1. ---
		2. Def's PDR Under N.C.G.S. § 7A-31	2. Denied
		3. State's Motion to Dismiss Appeal	3. Allowed
348P19	State v. Morquel Deshawn Redmond	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-801)	1. Dismissed *ex mero motu*
		2. Def's PDR Under N.C.G.S. § 7A-31	2. Denied
350P19	State v. Samantha Meiaza Matthews	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-1257)	1. Denied
		2. Def's Motion for Temporary Stay	2. Allowed **10/15/2019** Dissolved **12/04/2019**
		3. Def's Petition for Writ of Supersedeas	3. Denied

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352P19	State v. Kenneth Russell Anthony	1. State's Motion for Temporary Stay (COA18-1118) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/05/2019** Special Order 2. Special Order 3. Special Order
353P19	State v. Patrick Lynn Griggs	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1000)	Denied
362P19	Gavin Suarez, minor child, by and through Guardian Ad Litem, Richard P. Nordan, Esq.; Eric Suarez and Jean Suarez, individually and as parents and natural guardians of Gavin Suarez, Plaintiffs v. American Ramp Company (ARC); Town of Swansboro, Defendants v. Alaina Hess, Third-Party Defendant	Def's (Town of Swansboro) PDR Under N.C.G.S. § 7A-31 (COA19-36)	Denied **Davis, J., recused**
363A14-4	Sandhill Amusements, Inc. and Gift Surplus, LLC v. State of North Carolina, ex rel. Roy Cooper, Governor, in his official capacity, Branch Head of the Alcohol Law Enforcement Branch of the State Bureau of Investigation, Mark Senter, in his official capacity, Secretary of the North Carolina Department of Public Safety, Erik Hooks, in his official capacity, and the Director of the North Carolina State Bureau of Investigation, Bob Schurmeier, in his official capacity	1. Plt's Motion for Temporary Stay (COA14-85; COAP17-693) 2. Plt's Petition for Writ of Supersedeas	1. Allowed **11/19/2019** 2. **Ervin, J., recused** **Davis, J., recused**

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363P19	State v. Michael Eugene Bradley	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1297)	Denied
369A19	In the Matter of A.H.F.S., R.S.F.S., and C.F.S.	Respondent's Petition for Writ of Certiorari to Review Decision of District Court, Henderson County	Allowed
371P19	Crystal Gail Mangum v. Marianne Bond - Officer Durham Police Department, and Durham District Attorney's Office	Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-19)	Denied
396A19	In re J.M.	Respondent's Motion for Extension of Time to File Brief	Allowed **11/06/2019** **Davis, J., recused**
398P19	Gregory E. Lindberg v. Tisha L. Lindberg	Plt's PDR Under N.C.G.S. § 7A-31 (COA19-78)	Denied **Davis, J., recused**
415P19	State v. Scott Randall Reich	1. Def's Pro Se Motion for Appeal for Help in Obtaining All Files of Discovery (COAP19-666) 2. Def's Pro Se Motion for Appointment of Counsel	1. Dismissed **10/31/2019** 2. Dismissed **10/31/2019** **Davis, J., recused**
417PA18	State v. Rudolph Coles, Jr.	Def's Motion for Appropriate Relief (COA18-357)	Special Order
417P19	Common Cause, et al. v Lewis, et al.	1. Plts' PDR Prior to a Determination by the COA 2. Plts' Motion to Suspend Appellate Rules 3. Legislative-Defs' Motion to Delay Ruling on PDR Prior to a Determination by the COA 4. Legislative-Defs' Motion to Recuse Justice Earls	1. Denied **11/15/2019** 2. Dismissed as moot **11/15/2019** 3. Dismissed as moot **11/15/2019** 4. Denied **11/15/2019**
418A19	In the Matter of A.D.	Respondent-Mother's Motion to Withdraw Appeal	Special Order **12/03/2019**
427P19	State v. Maliq Anthony Marshall-Hardy	Def's Pro Se Motion for Dismissal of Pending Allegations	Dismissed **11/08/2019**

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434PA18	PHG Asheville, LLC v. City of Asheville	Petitioner's Motion to Supplement Appellate Record	Allowed
434P19	State v. Christophe C. Exum	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wayne County (COAP19-15)	Denied **11/20/2019**
445P19	State v. Jason Travon Peterson	1. Def's Pro Se Motion for Temporary Stay (COA17-26) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Pitt County	1. Denied **11/21/2019** 2. Denied **11/21/2019** 3. Denied **11/21/2019**
447P18	State v. Milton Denard Hauser	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-717) 2. Def's Petition for Writ of Certiorari to Review Order of the COA 3. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Forsyth County	1. Denied 2. Denied 3. Denied
447A19	State v. Ryan Kirk Fuller	1. Def's Motion for Temporary Stay (COA19-243) 2. Def's Petition for Writ of Supersedeas	1. Allowed **11/22/2019** 2.
576P07-5	State v. Moses Leon Faison	Def's Petition for Writ of Certiorari to Review Order of Superior Court, Greene County	Dismissed

IN THE MATTER OF THE ADVISORY)
COMMISSION ON PORTRAITS)

ADMINISTRATIVE ORDER

On 25 October 2018, this Court established an Advisory Commission on Portraits to consider matters related to portraits of former justices of the Supreme Court of North Carolina and directed the Commission to promulgate a report and recommendation to the Court on or before 31 December 2019. It appearing to the Court that the Commission would benefit from additional time to consider these matters, the previously established deadline is extended to 31 December 2020.

By order of the Court, this the 4th day of December, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of December, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

ADMINISTRATIVE ORDER CONCERNING THE FORMATTING OF OPINIONS AND THE ADOPTION OF A UNIVERSAL CITATION FORM

Effective 1 January 2021, an opinion number and paragraph numbers will appear in every opinion filed by the Supreme Court of North Carolina and the North Carolina Court of Appeals. Like a docket number or a party's name, these opinion and paragraph numbers will be native to the text of the opinion and may therefore appear across mediums of publication. Accordingly, opinions filed on or after 1 January 2021 will have an immediate, permanent, and medium-neutral ("universal") citation the moment they are issued.

Because a universal citation is medium-neutral, it does not point to an official publication of the opinion. The *North Carolina Reports* and the *North Carolina Court of Appeals Reports* remain the official reports of the opinions of the Supreme Court of North Carolina and of the North Carolina Court of Appeals, respectively.

Opinions of the Supreme Court of North Carolina and the North Carolina Court of Appeals that are filed on or after 1 January 2021 should be cited using this format: [Case Name], [Traditional Citation to the Bound Volume and Page Number of the Court's Official Reporter], [Universal Citation to the Year, Court, and Opinion Number], [Pinpoint Paragraph Number].

e.g., *State v. Smith*, 375 N.C. 152, 2020-NCSC-45, ¶ 16.

State v. Smith, 255 N.C. App. 43, 2020-NCCOA-118, ¶ 23.

By virtue of this administrative order, the Appellate Reporter, the Director of Appellate Division Computing, and the Supreme Court's Administrative Counsel are hereby instructed to implement this formatting and citation form and to promote its use by the stakeholders in our legal and judicial communities, subject to further orders of the Court.

Ordered by the Court in Conference, this the 4th day of December, 2019.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of December, 2019.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

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